DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-10
Title: Michael D. Turner, Petitioner
v.
Rebecca L. Rogers, et al.
Docketed: June 29, 2010
Lower Ct: Supreme Court of South Carolina
Case Nos: (26793)
Decision Date: March 29, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Jun 25 2010	Petition for a writ of certiorari filed. (Response due July 29, 2010)
Jul 22 2010	Order extending time to file response to petition to and including August 30, 2010.
Jul 27 2010	Consent to the filing of amicus brief's, in support of either party or of neither party, received from counsel for the petitioner.
Jul 27 2010	Order extending time to file response to petition to and including September 27, 2010, for all respondents.
Jul 29 2010	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jul 29 2010	Brief amici curiae of Center for Family Policy and Practice, et al. filed.
Jul 29 2010	Brief amicus curiae of Constitution Project filed.
Sep 24 2010	Motion for leave to intervene filed by Larry E. Price, Sr.
Sep 24 2010	Brief of respondent South Carolina Department of Social Services in opposition filed.
Sep 24 2010	Motion for leave to proceed in forma pauperis filed by respondents Rebecca L. Rogers and Larry Price, Sr.
Sep 24 2010	Brief of respondents Rebecca L. Rogers and Larry Price, Sr. in opposition filed.
Sep 28 2010	Letter received from counsel for petitioner Michael D. Turner. (Distributed)
Oct 5 2010	Reply of petitioner Michael D. Turner filed. (Distributed)
Oct 6 2010	DISTRIBUTED for Conference of October 29, 2010.
Nov 1 2010	Motion for leave to intervene filed by respondent GRANTED.
Nov 1 2010	Motion for leave to proceed in forma pauperis filed by respondents GRANTED.
Nov 1 2010	Petition GRANTED in addition to the question presented by the petition the parties are directed to brief and argue the following question: "Does the Court have jurisdiction to review the decision of the South Carolina Supreme Court?"
Nov 10 2010	Motion to appoint counsel filed by respondents Rebecca L. Rogers and Larry

Price: $

Nov 23 2010 Motion DISTRIBUTED for Conference of December 10, 2010

Nov 23 2010 The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 4, 2011.

Nov 23 2010 The time to file respondents' brief on the merits is extended to and including February 9, 2011.

Dec 13 2010 Motion to appoint counsel filed by respondents DENIED.

Dec 23 2010 SET FOR ARGUMENT ON Wednesday, March 23, 2011.

Jan 4 2011 Joint appendix filed. (Statement of costs filed.)

Jan 4 2011 Brief of petitioner Michael D. Turner filed.

Jan 6 2011 Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.

Jan 11 2011 Brief amicus curiae of Constitution Project filed.

Jan 11 2011 Brief amicus curiae of the United States filed.

Jan 11 2011 Brief amicus curiae of American Bar Association filed.

Jan 11 2011 Brief amicus curiae of Center for Family Policy and Practice filed.

Jan 11 2011 Brief amici curiae of Legal Aid Society of the District of Columbia, et al. filed.

Jan 11 2011 Brief amici curiae of Elizabeth G. Patterson, et al. filed.

Jan 11 2011 Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)

Jan 14 2011 CIRCULATED.

Feb 8 2011 Brief of respondents Rebecca L. Rogers, et al. filed. (Distributed)

Feb 11 2011 Record received from Supreme Court of South Carolina. (1 envelope)

Feb 14 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Feb 15 2011 Brief amici curiae of Senators Dement, et al. filed. (Distributed)

Feb 15 2011 Brief amici curiae of Texas, et al. filed. (Distributed)

Feb 15 2011 Brief amici curiae of Law Professors Benjamin Barton and Darryl Brown filed. (Distributed)

Mar 4 2011 Reply of petitioner Michael D. Turner filed. (Distributed)

Mar 7 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED and the time is divided as follows: 30 minutes for the petitioner, 10 minutes for the Acting Solicitor General, and 30 minutes for the respondents.

Mar 23 2011 Argued. For petitioner: Seth P. Waxman, Washington, D. C. For United States, as amicus curiae: Leondra R. Kruger, Acting Principal Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: Stephanos Bibas, Philadelphia, Pa.

Mar 25 2011 Letter from counsel for petitioner Michael D. Turner received. (Distributed)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

(1)

JUN 25 2010

No. 10-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA PRICE AND
SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of South Carolina erred in holding—in conflict with twenty-two federal courts of appeals and state courts of last resort—that an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration.

PARTIES TO THE PROCEEDING

The petitioner is Michael D. Turner, the defendant and appellant in the courts below. Rebecca Price, the plaintiff and respondent in the courts below, is a respondent.

This petition draws into question the constitutionality of South Carolina's practice of denying the right to appointed counsel to indigent defendants at civil contempt proceedings that may result in the defendant's incarceration. In the child-support enforcement proceedings in the South Carolina Family Court, the South Carolina Department of Social Services ("DSS") was identified as the plaintiff on some orders and filings. Petitioner served a copy of his notice of appeal on the Attorney General of South Carolina, but the State declined to appear in the appellate court. As of May 2009, the minor child whose support was at issue below had been removed from the custody of respondent Price, and the family court ordered petitioner's child-support payments to be remitted to DSS through the clerk of the family court. For these reasons, petitioner has identified DSS as a respondent and served a copy of this petition on the Attorney General of South Carolina and the General Counsel of DSS. *Cf.* 28 U.S.C. § 2403(b); S. Ct. R. 29.4(c).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 11

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THE FEDERAL AND STATE COURTS 12

A. The Decision Below Conflicts With The Decisions Of Seven Federal Courts Of Appeals 12

B. The Decision Below Conflicts With A Substantial Number Of State Court Decisions 16

II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S CASE LAW ON THE RIGHT TO COUNSEL 19

A. This Court Has Held That The Right To Counsel Applies In Any Proceeding In Which A Person's Physical Liberty Is At Stake 20

B. The Decision Below Cannot Be Squared With This Court's Precedent 24

TABLE OF CONTENTS—Continued

Page

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING IT 30

CONCLUSION 32

APPENDIX A: Decision of the Supreme Court of South Carolina filed March 29, 2010 ..... 1a

APPENDIX B: Order for Contempt of Court of the Family Court for the Tenth Judicial Circuit, Oconee County, South Carolina filed January 3, 2008 ..... 6a

APPENDIX C: Final Brief of Appellant in the Court of Appeals of South Carolina filed August 19, 2008 ..... 10a

APPENDIX D: Transcript of Record for proceedings before the Family Court for the Tenth Judicial Circuit, Oconee County, South Carolina held January 3, 2008 ..... 16a

APPENDIX E: Order of Financial Responsibility of the Family Court for the Tenth Judicial Circuit, Oconee County, South Carolina filed June 18, 2003 ..... 19a

TABLE OF AUTHORITIES

CASES

Page(s)

Abate v. *Abate*, 660 S.E.2d 515 (S.C. Ct. App. 2008) 27

Adkins v. *Adkins*, 248 S.E.2d 646 (Ga. 1978) 18

Alabama v. *Shelton*, 535 U.S. 654 (2002) 22, 23, 24, 25, 28

Allen v. *Sheriff of Lancaster County*, 511 N.W.2d 125 (Neb. 1994), *overruled on other grounds by Smeal Fire Apparatus Co.* v. *Kreikemeier*, 279 Neb. 661 (Apr. 16, 2010) 17

Andrews v. *Walton*, 428 So. 2d 663 (Fla. 1983) 18, 19

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 2, 20, 21

Black v. *Division of Child Support Enforcement*, 686 A.2d 164 (Del. 1996) 16

Bloom v. *Illinois*, 391 U.S. 194 (1968) 21

Bott v. *Bott*, 437 P.2d 684 (Utah 1968) 18

Bradford v. *Bradford*, No. 86-262-II, 1986 WL 2874 (Tenn. Ct. App. Mar. 7, 1986) 17, 30

Brasington v. *Shannon*, 341 S.E.2d 130 (S.C. 1986) 5, 6, 27

Choiniere v. *Brooks*, 660 A.2d 289 (Vt. 1995) 17

Colson v. *State*, 498 A.2d 585 (Me. 1985) 18

Cooke v. *United States*, 267 U.S. 517 (1925) 21, 29

County of Santa Clara v. *Superior Court*, 5 Cal. Rptr. 2d 7 (Ct. App. 1992) 17

Cox v. *Slama*, 355 N.W.2d 401 (Minn. 1984) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Custis v. *United States*, 511 U.S. 485 (1994) 28

Duval v. *Duval*, 322 A.2d 1 (N.H. 1974) 19

Emerick v. *Emerick*, 613 A.2d 1351 (Conn. App. Ct. 1992) 17

Ex parte Parcus, 615 So. 2d 78 (Ala. 1993) 16

Ex parte Walker, 748 S.W.2d 21 (Tex. App. 1988) 17

Ferris v. *State ex rel. Maass*, 249 N.W.2d 789 (Wis. 1977) 17

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 24

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 20, 21

Glover v. *United States*, 531 U.S. 198 (2001) 20

Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 25, 28, 29

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 26

Hicks ex rel. Feiock v. *Feiock*, 485 U.S. 624 (1988) 26, 29

Hicks v. *Hicks*, 312 S.E.2d 598 (S.C. Ct. App. 1984) 6

Hunt v. *Moreland*, 697 S.W.2d 326 (Mo. Ct. App. 1985) 17

In re Calhoun, 350 N.E.2d 665 (Ohio 1976) 18

In re Di Bella, 518 F.2d 955 (2d Cir. 1975) 13

In re Gault, 387 U.S. 1 (1967) 22, 27

In re Grand Jury Proceedings, 468 F.2d 1368 (9th Cir. 1972) 14

TABLE OF AUTHORITIES—Continued

Page(s)

In re Kilgo, 484 F.2d 1215 (4th Cir. 1973) 13

In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987) 17

In re Oliver, 333 U.S. 257 (1948) 21

International Union, United Mine Workers of America v. *Bagwell*, 512 U.S. 821 (1994) 21, 28

Johnson v. *Johnson*, 721 P.2d 290 (Kan. Ct. App. 1986) 17

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 21

Krieger v. *Commonwealth*, 567 S.E.2d 557 (Va. Ct. App. 2002) 18

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981) 2, 12, 20, 22, 23, 25

Leonard v. *Hammond*, 804 F.2d 838 (4th Cir. 1986) 30

Lewis v. *Lewis*, 875 S.W.2d 862 (Ky. 1993) 16

Maggio v. *Zeitz*, 333 U.S. 56 (1948) 26, 29

Mann v. *Hendrian*, 871 F.2d 51 (7th Cir. 1989) 14

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 25

May v. *Coleman*, 945 S.W.2d 426 (Ky. 1997) 16

McBride v. *McBride*, 431 S.E.2d 14 (N.C. 1993) 17

McNabb v. *Osmundson*, 315 N.W.2d 9 (Iowa 1982) 17

Mead v. *Batchlor*, 460 N.W.2d 493 (Mich. 1990) 17, 30

Middendorf v. *Henry*, 425 U.S. 25 (1976) 23, 24

TABLE OF AUTHORITIES—Continued

Page(s)

Moseley v. *Mosier*, 306 S.E.2d 624 (S.C. 1983) 6

Muniz v. *Hoffman*, 422 U.S. 454 (1975) 21

Northeast Women's Center, Inc. v. *McMonagle*, 939 F.2d 57 (3d Cir. 1991) 14

Otton v. *Zaborac*, 525 P.2d 537 (Alaska 1974) 16

Pasqua v. *Council*, 892 A.2d 663 (N.J. 2006) 17, 18

People v. *Lucero*, 584 P.2d 1208 (Colo. 1978) 16

Peters-Riemers v. *Riemers*, 663 N.W.2d 657 (N.D. 2003) 17

Poston v. *Poston*, 502 S.E.2d 86 (S.C. 1998) 29

Powell v. *Alabama*, 287 U.S. 45 (1932) 19, 21, 27

Ridgway v. *Baker*, 720 F.2d 1409 (5th Cir. 1983) 12, 14, 15

Rodriguez v. *Eighth Judicial District Court*, 102 P.3d 41 (Nev. 2004) 19

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 24

Rutherford v. *Rutherford*, 464 A.2d 228 (Md. 1983) 17

Sanders v. *Shephard*, 645 N.E.2d 900 (Ill. 1994) 16

Sanders v. *Shephard*, 541 N.E.2d 1150 (Ill. Ct. App. 1989) 17

Scott v. *Illinois*, 440 U.S. 367 (1979) 20

Sevier v. *Turner*, 742 F.2d 262 (6th Cir. 1984) 13

Shillitani v. *United States*, 384 U.S. 364 (1966) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Spartanburg County Department of Social Services v. *Padgett*, 370 S.E.2d 872 (S.C. 1988) 6

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Tetro v. *Tetro*, 544 P.2d 17 (Wash. 1975) 17

Tracy v. *Tracy*, 682 S.E.2d 14 (S.C. Ct. App. 2009) 27

Ullah v. *Entezari-Ullah*, 836 N.Y.S.2d 18 (App. Div. 2007) 17

United States v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) 13, 14

United States v. *Dixon*, 509 U.S. 688 (1993) 21

United States v. *McAnlis*, 721 F.2d 334 (11th Cir. 1983) 14

United States v. *Rylander*, 460 U.S. 752 (1983) 25

Vitek v. *Jones*, 445 U.S. 480 (1980) 22

Walker v. *McLain*, 768 F.2d 1181 (10th Cir. 1985) 13, 14, 15, 25, 30

Weiss v. *United States*, 510 U.S. 163 (1994) 24

Widman v. *Widman*, 557 S.E.2d 693 (S.C. Ct. App. 2001) 6

Wilson v. *New Hampshire*, 18 F.3d 40 (1st Cir. 1994) 14

Wold Family Farms, Inc. v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719 (S.D. 2003) 17

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const.
amend. VI 2
amend. XIV, § 1 2

28 U.S.C.
§ 1257 2
§ 2403 ii

42 U.S.C.
§ 608 ..... 4, 7
§ 652 4
§ 654 4
§ 656 4
§ 657 4
§ 666 4
§ 1983 30

S.C. Code Ann.
§ 43-5-65 7
§ 63-3-620 ..... 5, 6
§ 63-17-490 27
§ 63-17-500 27
§ 63-17-750 5

Tex. Fam. Code Ann. § 157.008 26

RULES

S. Ct. R. 29.4 ..... ii, 2

S.C. App. Ct. R. 204 10

S.C. Fam. Ct. R. 24 5

TABLE OF AUTHORITIES—Continued

Page(s)

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Page(s)

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IN THE

Supreme Court of the United States

No. 10-

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA PRICE AND
SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael D. Turner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 691 S.E.2d 470 (S.C. 2010). App. 1a-5a. The order of the South Carolina Family Court is unreported. App. 6a-9a.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on March 29, 2010. This Court has jurisdic-

tion pursuant to 28 U.S.C. § 1257(a). Consistent with this Court's Rule 29.4(c), a copy of this petition has been served on the Attorney General of South Carolina. *See supra* p. ii.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT

This Court has held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). The Court has likewise interpreted the Due Process Clause to require that in proceedings that may result in incarceration, "the [defendant] has a right to appointed counsel even though those proceedings may be styled 'civil' and not 'criminal.'" *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25 (1981). In this case, petitioner Michael Turner, who is indigent, was incarcerated for twelve months after a family court judge found him in civil contempt of an order to pay child support for respondent Rebecca Price's minor child. Turner

had no lawyer at the contempt hearing, and the family court never advised him of his right to counsel.

On appeal, Turner challenged his incarceration under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Turner argued that, as an indigent defendant, he had a constitutional right to appointed counsel in civil contempt proceedings that result in incarceration. The Supreme Court of South Carolina rejected that argument on the ground that the right to counsel applies only in criminal contempt proceedings. That holding is in direct conflict with the decisions of twenty-two federal courts of appeals and state courts of last resort. Moreover, it is irreconcilable with this Court's holding in *Lassiter* that the Constitution requires appointment of counsel in any proceeding that may result in the defendant's incarceration, regardless whether the proceeding is civil or criminal.

For indigent noncustodial parents, the practical consequences of the decision below are as unjust as its reasoning is baseless. Turner's case is illustrative. Because Price received public assistance, Turner was required to pay his support payments through the family court, and the child-support enforcement proceedings against him were therefore subject to certain automated procedures: Each time Turner's support account fell into arrears, the clerk of the family court automatically issued a rule to show cause why Turner should not be held in contempt of court. Notwithstanding his indigence, Turner has thus been repeatedly incarcerated for contempt without the assistance of counsel. These "civil" sanctions have become for Turner—and countless indigent parents like him who lack the financial ability to secure their release—a form of modern day debtors' prison.

Indigent noncustodial parents are routinely incarcerated in similar circumstances in South Carolina and other States that do not recognize a right to counsel in civil contempt proceedings. These parents have no meaningful prospect of release because their indigence prevents them from paying the ordered support or hiring a lawyer to help defend against the contempt charges. The Court should grant certiorari to ensure that defendants in these circumstances are not incarcerated without the aid of counsel, and to resolve the conflict over the scope of the right to counsel in civil contempt proceedings.

1. *Legal Background.* This case arises out of efforts by Price and the South Carolina Department of Social Services ("DSS") to collect child-support payments from Turner for the support of Price's daughter. Child-support cases involving a child or custodial parent who receives public assistance are governed by a mix of state and federal requirements. At the federal level, Part D of Title IV of the Social Security Act, as amended, requires States that receive federal family assistance grants to establish child-support enforcement procedures that meet federal standards for locating noncustodial parents, establishing paternity, and collecting support payments. *See generally* 42 U.S.C. §§ 652, 654, 666. In particular, States must require, as a condition for receipt of federally funded public assistance, that custodial parents cooperate in identifying noncustodial parents and assign their support rights to the State, to be enforced until the support payments paid exceed the public assistance received. *See id.* §§ 608(a)(2), (3), 656(a), 657(a)(1), (2).

In South Carolina, child-support orders are enforced through contempt proceedings in the family court. Under South Carolina law, "[a]n adult who wil-

fully violates, neglects, or refuses to obey or perform a lawful order of the court," including an order to pay child support, "may be proceeded against for contempt of court." S.C. Code Ann. § 63-3-620; *see also id.* § 63-17-750(b).[1] Rule 24 of the South Carolina Rules of Family Court provides that in all cases in which support payments are made through the court—which includes all so-called "IV-D" cases subject to Part D of Title IV of the Social Security Act—the clerk of the court must review all child-support accounts monthly. Whenever the clerk finds that an account has fallen more than five days in arrears, Rule 24 requires the clerk *sua sponte* to issue an affidavit and rule to show cause why the child-support obligor should not be held in contempt of court.

Pursuant to the rule to show cause, the defendant is required to appear at a contempt hearing in family court, and the clerk's affidavit becomes the basis for establishing the defendant's noncompliance with the underlying child-support order. The affidavit "must identify the court order which the respondent has allegedly violated," and "the specific acts or omissions which constitute noncompliance." *Brasington v. Shannon*, 341 S.E.2d 130, 131 (S.C. 1986).

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[1] The contempt statute does not differentiate between civil and criminal contempt. *See* S.C. Code Ann. § 63-3-620. An adult found in contempt of court "may be punished by a fine, a public work sentence, or by imprisonment in a local correctional facility, or any combination of them, in the discretion of the court, but not to exceed imprisonment in a local correctional facility for one year, a fine of fifteen hundred dollars, or public work sentence of more than three hundred hours, or any combination of them." *Id.*

Because South Carolina law defines contempt as the "wilful[] violat[ion]" of a court order, S.C. Code Ann. § 63-3-620, contempt may be found only where the defendant acts "'voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" *Spartanburg County Dep't of Soc. Servs.* v. *Padgett*, 370 S.E.2d 872, 874 (S.C. 1988). Where a defendant is unable to obey a court order without fault on his part, he is not to be held in contempt. In the child-support context, this means that a noncustodial parent who lacks the resources to make court-ordered child-support payments cannot be held in contempt. *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983); *Hicks* v. *Hicks*, 312 S.E.2d 598, 599 (S.C. Ct. App. 1984). The defendant, however, bears the burden of proving that defense: Once the moving party has established a prima facie case of willful contempt by showing the existence of a court order and the defendant's noncompliance, the burden shifts to the defendant to establish his inability to comply with the underlying order. *See, e.g.*, *Brasington*, 341 S.E.2d at 131; *Widman* v. *Widman*, 557 S.E.2d 693, 705 (S.C. Ct. App. 2001).

The South Carolina contempt statute and family court rules are silent as to whether defendants have a right to counsel (appointed or otherwise) at contempt hearings.

2. *Factual Background.* Respondent Rebecca Price's daughter B.L.P. was born in 1996. Price received public assistance for a time, and she accordingly assigned her right to collect child support to the State,

as required by law.[2] In 2003, the South Carolina Department of Social Services ("DSS"), with Price's cooperation, established that petitioner Michael Turner was B.L.P.'s father and moved for a determination of financial responsibility in the Oconee County Family Court. On June 18, 2003, the court entered an Order of Financial Responsibility requiring Turner to make child-support payments of $51.73 per week. App. 19a, 22a. The court made Turner's support obligation retroactive to the date Price initiated the child-support proceedings. Consequently, from the day the court issued the child-support order, Turner was already in arrears on his payments by more than $200. App. 21a. The order recorded Turner's employment status at the time as "unemployed," but imputed to him a gross monthly income of $1,386 per month. App. 20a-21a.[3]

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[2] *See* 42 U.S.C. § 608(a)(3); S.C. Code Ann. § 43-5-65(a). Documents in the family-court record thus bear the designation "IV-D," to reflect that the child-support enforcement proceedings are governed by Part D of Title IV of the Social Security Act and corresponding provisions of South Carolina law. On certain orders and filings in the family court, Price is identified as the plaintiff; on others, DSS is identified as the plaintiff. Initially, the clerk forwarded any payments Turner made to DSS. In March 2004, the clerk began remitting Turner's payments directly to Price, whose public-assistance benefits had terminated. The support order, however, continued to be administered as a IV-D case. By May 2009, B.L.P. had been placed in the custody of her maternal grandmother, Judy Price, and the court approved DSS's request that the clerk change the payee to Judy Price and forward any support payments to DSS.

[3] The imputed income was calculated according to a standardized formula set by DSS. App. 25a. This figure was reduced to $1,084 per month to reflect that Turner had two other minor children with Jennie Turner, whom Turner had married in 1999. *Id.*

Over the next few years, Turner struggled to maintain employment and failed to keep up with his child-support payments. Turner's arrearages—and with them, his weekly payment obligation—mounted. Pursuant to the automatic procedures required by Rule 24, the clerk of the family court issued at least four rules to show cause why Turner should not be held in contempt, with the first rule issuing just two months after the court entered the original support order. Turner was found in contempt of court on each occasion. On at least three of those occasions, Turner was jailed following the contempt hearing for terms of varying duration, with the prospect of early release if he paid his arrearage in full.[4] During each stint in jail, Turner's unpaid support obligations continued to accumulate. And each time Turner was released from jail, the clerk soon issued another rule to show cause, and the contempt cycle would begin again. Turner was not represented by counsel during any of these contempt proceedings.

3. *Proceedings Below.* In March 2006, less than two months after Turner's release from a prior contempt sentence, the court clerk issued another rule to show cause why Turner should not be held in contempt. At a hearing in April 2006, the court found that Turner owed more than $1,000 in child support and ordered wage withholding. Turner's account remained in arrears, however, and the court issued a bench warrant

[4] In some instances, Turner was released from jail after payments were made on his behalf. The record does not indicate who made those payments. According to family-court records, Turner occasionally found short-lived employment with various construction or auto repair companies, and the court was sometimes able to collect child support from those employers through automated wage withholding.

for his arrest. Turner was arrested in December 2007 and booked into the Oconee County jail.

On January 3, 2008, Turner appeared in family court for the contempt hearing. By this time, the court found, Turner was behind on his child support by $5,728.76. App. 6a. At the brief hearing, Turner attempted to explain that he had been unable to pay due to a combination of substance abuse problems and physical disability:

> Well, when I first got out [of jail], I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me.

App. 17a.[5]

Without making any findings of fact as to whether Turner was able to pay the $5,728.76 in arrears, the

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[5] Turner had applied for Supplemental Security Income ("SSI") and disability insurance benefits in August 2007. In his application, Turner stated that he lived at the time with his wife and their three children and that B.L.P. was also his child; that he received no income other than Social Security and had no assets other than a vehicle valued at $1,500; and that his wife earned approximately $500 per month in unemployment compensation and owned no assets.

court sentenced Turner to a term of incarceration not to exceed twelve months. App. 6a-9a. The court's order provided that Turner could purge himself of the contempt and be released if he paid the balance on his account in full. App. 7a. The court also placed a lien on any Social Security disability or other benefits Turner might receive. *Id.* Turner was then committed to the Oconee County jail, where he remained incarcerated for the full twelve months. Turner was not represented by counsel at the hearing, and the court did not advise Turner that he had a right to counsel.

Represented by volunteer *pro bono* counsel, Turner filed a notice of appeal of the family court's order. The court of appeals waived Turner's filing fee. Turner argued on appeal that he had a right under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to have the assistance of counsel before the State could incarcerate him. App. 10a-15a. The Supreme Court of South Carolina rejected that argument and affirmed the family court's judgment.[6]

The state supreme court held that the constitutional right to counsel applies only in criminal contempt proceedings. App. 2a-4a. "[Imprisonment for] criminal

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[6] Turner filed his appellate brief in the South Carolina Court of Appeals. Acting on its own initiative pursuant to South Carolina Appellate Court Rule 204(b), the Supreme Court of South Carolina certified Turner's appeal to itself before the intermediate appellate court could act. App. 1a. Although Turner's counsel had served the notice of appeal on both Price as respondent and the Attorney General of South Carolina as a necessary party, neither Price nor the Attorney General filed a brief on appeal. The state supreme court decided the case without their participation and without oral argument.

contempt triggers additional constitutional safeguards [including the right to counsel] not mandated in civil contempt proceedings," the court reasoned, because incarceration in criminal cases is "unconditional." App. 3a. In contrast, the court held, "[a] contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time," and therefore has no right to counsel. *Id.*

The state supreme court acknowledged that the majority of courts to have considered the issue have held that indigent defendants in civil contempt proceedings resulting in incarceration do have a constitutional right to appointed counsel. App. 3a n.2. It further recognized that "in holding [that] a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position." *Id.*

REASONS FOR GRANTING THE PETITION

The Supreme Court of South Carolina's decision conflicts with the decisions of twenty-two federal courts of appeals and state courts of last resort. In contrast with the decision below, those courts have expressly rejected the view that when an individual faces incarceration, his right to counsel turns on whether the proceeding in question is "civil" or "criminal." The decision below also cannot be reconciled with this Court's right-to-counsel precedent, which recognizes a general rule that the Constitution requires appointment of counsel in *any* proceeding—civil or criminal—that results in incarceration.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THE FEDERAL AND STATE COURTS

As the Supreme Court of South Carolina acknowledged, the decision below conflicts with the decisions of several federal courts of appeals and state courts of last resort. App. 3a n.2 (noting disagreement with four federal courts of appeals and eleven state supreme courts). In fact, the state supreme court understated the severity of the split: Seven federal circuit courts and fifteen state courts of last resort have held that indigent defendants in civil contempt proceedings have a right to appointed counsel if they face incarceration. Only a handful of state courts have ruled otherwise.

A. The Decision Below Conflicts With The Decisions Of Seven Federal Courts Of Appeals

The state supreme court's decision is squarely at odds with decisions from the U.S. Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. Each of those courts has held that an indigent defendant facing the prospect of incarceration in a civil contempt proceeding has a right to appointed counsel.

The leading federal decision is *Ridgway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983), which was factually similar to Turner's case. In *Ridgway*, an indigent defendant had been incarcerated for failing to pay child support without the assistance of counsel at his contempt hearing. The Fifth Circuit, relying on *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), granted habeas relief on the ground that the right to counsel "extends to every case in which the litigant may be deprived of his personal liberty if he loses," regardless whether the proceeding is civil or criminal. 720 F.2d at 1413.

The Sixth and Tenth Circuits, relying on *Lassiter*, have similarly concluded that indigent civil contemnors are entitled to counsel before they may be incarcerated. *See Sevier* v. *Turner*, 742 F.2d 262, 267 (6th Cir. 1984) ("Since [the defendant] was incarcerated for sixteen days as a result of the civil contempt hearing, he was entitled to have the assistance of counsel during that proceeding."); *Walker* v. *McLain*, 768 F.2d 1181, 1185 (10th Cir. 1985) ("an indigent defendant threatened with incarceration for civil contempt ... [must] be appointed counsel to assist him in his defense"). Like the Fifth Circuit, these courts stressed that there is no meaningful distinction between civil and criminal contempt proceedings when the outcome is incarceration:

> As indicated by the Supreme Court in *Lassiter*, the relevant question in determining if a defendant is entitled to counsel during [a civil] contempt proceeding is not whether the proceeding be denominated civil or criminal, but rather is whether the court in fact elects to incarcerate the defendant.

Sevier, 742 F.2d at 267; *see also Walker*, 768 F.2d at 1183 ("It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used.").

Indeed, even before *Lassiter*, all the federal circuit courts that addressed the issue agreed that the right to counsel applies in civil contempt proceedings that could lead to incarceration. *See In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973); *United States* v. *Anderson*, 553 F.2d 1154,

1155-1156 (8th Cir. 1977); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (9th Cir. 1972).[7]

In these cases, the federal courts laid down three sensible markers—each of which the Supreme Court of South Carolina brushed aside or ignored. First, they understood that, for purposes of the right to counsel, there is no meaningful distinction between civil and criminal proceedings when the outcome is incarceration. "The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil.'" *Ridgway*, 720 F.2d at 1413; *see also Anderson*, 553 F.2d at 1156 ("Deprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature."); *Walker*, 768 F.2d at 1183. By contrast, the Supreme Court of South Carolina elevated form over substance, concluding that the civil label, rather than Turner's incarceration, determined the boundaries of the right to counsel. App. 2a-3a.

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[7] Other circuits have acknowledged the issue in dicta. *See Wilson* v. *New Hampshire*, 18 F.3d 40, 41 (1st Cir. 1994) (per curiam) ("[w]hatever may be the rule in other contexts," no absolute right to counsel exists "where no order of incarceration has resulted"); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 939 F.2d 57, 68-69 (3d Cir. 1991) (finding Sixth Amendment right to counsel "inapposite" in civil contempt proceeding, but not addressing Due Process Clause); *Mann* v. *Hendrian*, 871 F.2d 51, 52 (7th Cir. 1989) (finding right to counsel in criminal contempt proceeding and noting other courts' holdings that the right applies also in civil contempt proceedings that actually "eventuate[] in imprisonment"); *United States* v. *McAulis*, 721 F.2d 334, 337 (11th Cir. 1983) ("not disput[ing]" that a right to counsel exists at civil contempt proceedings where imprisonment is a possibility, but finding waiver of that right).

Second, the federal courts rejected the fiction that an indigent civil contemnor "holds the keys to his cell" because he may purge his contempt and gain release from jail by complying with the underlying court order. These courts recognized that although the defendant may end his sentence, his indigence will prevent him from doing so in fact. As the Tenth Circuit noted, "[i]f [the defendant] is truly indigent, his liberty interest is no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison door if he cannot afford the price." *Walker*, 768 F.2d at 1184; *see also Ridgway*, 720 F.2d at 1413-1414. The Supreme Court of South Carolina, in contrast, believed that Turner needed no lawyer because he could "avoid [his] sentence altogether by complying with the court's previous support order," and thus was "not subject to a permanent or unconditional loss of liberty." App. 4a-5a.

Third, and most fundamentally, the federal courts have acknowledged that the assistance of counsel is indispensable to a civil contemnor facing incarceration. As the Fifth Circuit has explained, without the assistance of counsel, an indigent contempt defendant is at risk of "indefinite" confinement if the trial court erroneously determines that he "has the means to comply with the court's order." *Ridgway*, 720 F.2d at 1414. Because the burden is on the defendant to show his inability to comply, the absence of counsel heightens the risk of an erroneous judgment. "The indigent who appears without a lawyer can be charged neither with knowledge that he has such a burden nor with an understanding of how to satisfy it." *Id.* at 1415. Accordingly, "a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled 'criminal,' with a correspondingly greater need for counsel." *Id.* at 1414.

B. The Decision Below Conflicts With A Substantial Number Of State Court Decisions

The decision below also conflicts with decisions from fifteen state courts of last resort that have held that indigent defendants in civil contempt proceedings have a right to appointed counsel if they are at risk of incarceration. Just four other States—Florida, Georgia, Maine, and Ohio—are in the same camp as South Carolina. Courts in three other States—Nevada, New Hampshire, and New Mexico—have adopted a third approach, requiring trial courts to determine on a case-by-case basis whether appointment of counsel is warranted.

1. Unlike the court below, fifteen state courts of last resort have concluded that an indigent person must be advised of his right to appointed counsel at a civil contempt proceeding that could lead to incarceration.[8] *Otton* v. *Zaborac*, 525 P.2d 537, 538-539 (Alaska 1974); *People* v. *Lucero*, 584 P.2d 1208, 1214 (Colo. 1978); *Black* v. *Division of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996); *Sanders* v. *Shephard*, 645

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[8] The Supreme Court of South Carolina incorrectly included Alabama, Kentucky, and Minnesota in this group. App. 4a n.2 (citing *Ex parte Parcus*, 615 So. 2d 78 (Ala. 1993); *May* v. *Coleman*, 945 S.W.2d 426 (Ky. 1997); and *Cox* v. *Slama*, 355 N.W.2d 401 (Minn. 1984)). Only the dissent in *Parcus* would have found a right to counsel. 615 So. 2d at 84 (Maddox, J., dissenting from order quashing writ as improvidently granted). Although *May* did recognize a right to counsel, it relied on *Lewis* v. *Lewis*, 875 S.W.2d 862 (Ky. 1993), which identified the right as arising under state statutory law, *id.* at 864; *see May*, 945 S.W.2d at 427. Similarly, although *Cox* also found a right to counsel, it relied on the court's supervisory powers rather than on the U.S. Constitution. 355 N.W.2d at 403.

N.E.2d 900, 906 (Ill. 1994) (approving *Sanders* v. *Shephard*, 541 N.E.2d 1150, 1156-1157 (Ill. Ct. App. 1989)); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982); *Rutherford* v. *Rutherford*, 464 A.2d 228, 234-237 (Md. 1983); *Mead* v. *Batchlor*, 460 N.W.2d 493, 496-504 (Mich. 1990); *Allen* v. *Sheriff of Lancaster County*, 511 N.W.2d 125, 127 (Neb. 1994), *overruled on other grounds by Smeal Fire Apparatus Co.* v. *Kreikemeier*, 279 Neb. 661, 684 (Apr. 16, 2010); *Pasqua* v. *Council*, 892 A.2d 663, 671-674 (N.J. 2006); *McBride* v. *McBride*, 431 S.E.2d 14, 19 (N.C. 1993); *Peters-Riemers* v. *Riemers*, 663 N.W.2d 657, 664-665 (N.D. 2003); *Wold Family Farms, Inc.* v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 724-725 & n.3 (S.D. 2003); *Choiniere* v. *Brooks*, 660 A.2d 289, 289 (Vt. 1995); *Tetro* v. *Tetro*, 544 P.2d 17, 19 (Wash. 1975); *Ferris* v. *State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977).[9]

The Supreme Court of New Jersey's decision in *Pasqua* illustrates the reasoning of these cases:

> When an indigent litigant is forced to proceed at [a civil contempt] hearing without counsel, there is a high risk of an erroneous determination and wrongful incarceration. However seemingly simple [such] proceedings may be for

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[9] Intermediate appellate courts in eight other States have done the same. *County of Santa Clara* v. *Superior Court*, 5 Cal. Rptr. 2d 7, 10-12 (Ct. App. 1992); *Emerick* v. *Emerick*, 613 A.2d 1351, 1353-1354 (Conn. App. Ct. 1992); *In re Marriage of Staricha*, 509 N.E.2d 1117, 1119-1121 (Ind. Ct. App. 1987); *Johnson* v. *Johnson*, 721 P.2d 290, 294 (Kan. Ct. App. 1986) (dicta); *Hunt* v. *Moreland*, 697 S.W.2d 326, 328-330 (Mo. Ct. App. 1985); *Ullah* v. *Entezari-Ullah*, 836 N.Y.S.2d 18, 22 (App. Div. 2007); *Bradford* v. *Bradford*, No. 86-262-II, 1986 WL 2874, at *4-5 (Tenn. Ct. App. Mar. 7, 1986); *Ex parte Walker*, 748 S.W.2d 21, 22 (Tex. App. 1988).

> a judge or lawyer, gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson.

892 A.2d at 673.

2. Five state courts of last resort—in Florida, Georgia, Maine, and Ohio, as well as South Carolina—have held that there is no right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings. *Andrews* v. *Walton*, 428 So. 2d 663, 666 (Fla. 1983); *Adkins* v. *Adkins*, 248 S.E.2d 646, 646 (Ga. 1978); *Colson* v. *State*, 498 A.2d 585, 586-589 & n.4 (Me. 1985); *In re Calhoun*, 350 N.E.2d 665, 666-667 (Ohio 1976); App. 2a-3a.[10] Like the court below, these courts have held that the right to counsel applies only in criminal contempt proceedings. *See, e.g.*, App. 2a-3a.[11]

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[10] The Supreme Court of Utah has held that no right to counsel applies in civil contempt, although its decision did not expressly consider the issue as a matter of federal constitutional law. *Bott* v. *Bott*, 437 P.2d 684, 685 (Utah 1968). The intermediate court in Virginia has also rejected a constitutional right to counsel in civil contempt proceedings leading to incarceration. *Krieger* v. *Commonwealth*, 567 S.E.2d 557, 563-564 (Va. Ct. App. 2002).

[11] Explaining its reliance on the distinction between civil and criminal contempt, for example, the Supreme Court of Florida reasoned in circular fashion that the assistance of counsel is unnecessary in civil cases because inability to pay is a defense to civil contempt. *Andrews*, 428 So. 2d at 666. Ignoring the possibility of error and the need for counsel's help in establishing that defense, the court held that any infringement on physical liberty in civil cases is merely conditional: "[T]here are no circumstances in which a parent is entitled to court appointed counsel in a civil contempt pro-

3. Three state supreme courts have taken a third approach, concluding that trial courts should determine the need for counsel on a case-by-case basis. *Rodriguez v. Eighth Judicial Dist. Ct.*, 102 P.3d 41, 51 (Nev. 2004); *Duval v. Duval*, 322 A.2d 1, 4 (N.H. 1974); *State ex rel. Dep't of Human Servs. v. Rael*, 642 P.2d 1099, 1103-1104 (N.M. 1982). These courts have made clear, however, that appointment of counsel will be warranted only in rare circumstances. As the Nevada Supreme Court reasoned, "it would be the exception, not the rule, for a case to present such legal and factual complexities so as to require the aid of counsel." *Rodriguez*, 102 P.3d at 51.

The decision below thus stands in sharp contrast to the vast majority of state and federal decisions on the issue. This Court should grant the petition to resolve this conflict and bring the court below into line with the majority view.

II. The Decision Below Cannot Be Reconciled With This Court's Case Law On The Right To Counsel

The Supreme Court of South Carolina's holding also conflicts with this Court's precedent. This Court has consistently held that the assistance of counsel is indispensable in any proceeding, criminal *or* civil, in which a person's physical liberty is at stake. As explained below, there is no merit to the state court's determination that there should be an exception to this general rule for civil contempt cases. As in every other context in which this Court has upheld the right to

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ceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment." *Id.*

counsel, a defendant in a civil contempt proceeding faces a significant risk that he will be erroneously deprived of his physical liberty and needs "the guiding hand of counsel" if he is to avoid that outcome. *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

A. This Court Has Held That The Right To Counsel Applies In Any Proceeding In Which A Person's Physical Liberty Is At Stake

"[This] Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel." *Lassiter*, 452 U.S. at 26. Across a wide range of proceedings—whether civil or criminal—the Court has held that the right to counsel is triggered whenever a person is in jeopardy of losing his physical liberty.

In the first place, the Court has determined that the Sixth Amendment's guarantee of "the Assistance of Counsel" in "all criminal prosecutions" confers a right to counsel for *any* criminal defendant who faces incarceration. Absent a valid waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). Actual imprisonment is a unique penalty, "different in kind from fines or the mere threat of imprisonment." *Scott* v. *Illinois*, 440 U.S. 367, 373 (1979). Thus, "*any* amount of actual jail time has Sixth Amendment significance." *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (emphasis added).

In criminal prosecutions, the right to counsel arises not only from the literal text of the Sixth Amendment, but also from the requirements of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. Thus, in *Gideon* v. *Wainwright*, 372 U.S.

335 (1963), the Court categorically extended the Sixth Amendment right to counsel to criminal prosecutions in state courts through the Due Process Clause, holding that the right to counsel is a "fundamental safeguard[] of liberty" that is "essential to a fair trial." *Id.* at 339-345.[12]

These cases have recognized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). Without the "guiding hand of counsel," even a defendant who is not guilty "faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U.S. at 69. "That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Johnson*, 304 U.S. at 463. Indeed, the assistance of counsel "is often a requisite to the very existence of a fair trial," *Argersinger*, 407 U.S. at 31, because no defendant should "face[] incarceration on a conviction that has never been subjected to the crucible of meaningful adversarial test-

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[12] The Court similarly recognized a right to counsel in criminal contempt proceedings as a matter of due process. *See Cooke* v. *United States*, 267 U.S. 517, 537 (1925) ("Due process of law ... requires that the accused [in a criminal contempt case] should be advised of the charges and have a reasonable opportunity to meet them," which "includes the assistance of counsel"); *see also In re Oliver*, 333 U.S. 257, 275 (1948). More recently, the Court has made clear that criminal contempt "is a crime in the ordinary sense," *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968), the imposition of which is subject to the strictures of the Sixth Amendment. *See International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 826-827 (1994); *United States* v. *Dixon*, 509 U.S. 688, 696 (1993); *Muniz* v. *Hoffman*, 422 U.S. 454, 475-476 (1975).

ing," *Alabama* v. *Shelton*, 535 U.S. 654, 667 (2002) (internal quotation marks omitted).

The Court has thus held that the right to counsel applies also in *civil* cases in which a person's liberty is at stake. For example, the Court held in *In re Gault* that the right to counsel is "essential" in any juvenile delinquency hearing that could lead to the juvenile's commitment to state custody because such a proceeding "carr[ies] with it the awesome prospect of incarceration in a state institution" and is therefore "comparable in seriousness to a felony prosecution." 387 U.S. 1, 36-37 (1967). Given those stakes, a juvenile needs counsel "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36 (internal footnote omitted). Similarly, in *Vitek* v. *Jones*, a plurality of the Court concluded that a prisoner being considered for transfer to a mental institution must be afforded the right to counsel as a matter of due process because he retains a liberty interest in being free from involuntary psychiatric treatment. 445 U.S. 480, 493-494, 497 (1980) (plurality).

These decisions culminated in the Court's determination in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), that the right to counsel applies in any proceeding, civil or criminal, that could lead to incarceration. In *Lassiter*, the Court considered whether a parent is categorically entitled to the right to counsel in a proceeding to terminate parental rights. The Court answered in the negative, contrasting such cases with proceedings that involve a deprivation of physical liberty. Surveying the Sixth Amendment decisions, as well as *Gault* and *Vitek*, the Court noted the special nature of the immediate threat of incarceration, explain-

ing that the "pre-eminent generalization that emerges from" decades of precedent "is that [the right to counsel] has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.* at 25. The Court explained that "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Id.* The Court thus "dr[e]w from [its precedents] the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27.

The arc of these decisions is clear: They reflect the Court's longstanding position that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." *Shelton*, 535 U.S. at 661 (internal quotation marks omitted); *see also id.* at 675 (Scalia, J., dissenting) ("We have repeatedly emphasized actual imprisonment as the touchstone of entitlement to appointed counsel."). The Court has rejected formalistic distinctions between criminal and civil proceedings, between contempt hearings and prosecutions, and between the Sixth Amendment and the Due Process Clause. Instead, it has concluded that the right to counsel is triggered in any proceeding in which a litigant, if he loses, would be deprived of his physical liberty.[13]

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[13] *Middendorf* v. *Henry*, 425 U.S. 25 (1976), is not inconsistent with these cases. In *Middendorf*, the Court concluded that the right to counsel was not warranted in summary court-martial proceedings leading to confinement. But it did so because of the "particular deference [the Court owes] to the determination of Congress ... that counsel should not be provided in summary courts-

B. The Decision Below Cannot Be Squared With This Court's Precedent

The state supreme court departed from this Court's settled understanding of the right to counsel by upholding Turner's incarceration even though he was neither represented by counsel nor advised of his right to counsel. Although Turner's appellate brief relied heavily on *Lassiter*, *Argersinger*, and related cases, App. 11a-15a, the state supreme court neither acknowledged those cases nor offered any explanation for its break from this Court's decisions. Instead, the state court relied solely on the fact that this case involved civil, rather than criminal, contempt. App. 2a-3a. To justify its reliance on that distinction, the court explained that in its view, a civil contemnor is "not subject to a permanent or unconditional loss of liberty," and is therefore not entitled to counsel before being incarcerated. App. 4a-5a. That analysis is wrong and

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martial." *Id.* at 43. Subsequent decisions confirmed that the due-process analysis is uniquely limited in the military setting. *See Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981); *Weiss* v. *United States*, 510 U.S. 163, 176-179 (1994).

Nor does *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), detract from the general rule that an indigent litigant facing incarceration is entitled to appointed counsel. In *Gagnon*, the Court decided that a probationer who was previously convicted and sentenced does not have a categorical right to counsel at a subsequent probation revocation hearing. *Id.* at 789-790. As the Court recently recognized, *Gagnon* merely stands for the proposition that "the [right to counsel] inquiry trains on the stage of the proceedings" where "guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined." *Shelton*, 535 U.S. at 665. In this case, there can be no doubt that the relevant proceeding was the family court contempt hearing.

conflicts with this Court's precedent for at least three reasons.

First, this Court has already determined that actual imprisonment is the line demarcating the scope of the right to counsel. *Supra* Part II.A.[14] That rule makes sense: Whether civil or criminal, "the jail is just as bleak no matter which label is used." *Walker*, 768 F.2d at 1183. The state supreme court's focus on whether the loss of liberty is "conditional" or "unconditional" ignores the risk that a civil contempt defendant will be *erroneously* incarcerated for coercive purposes even though he is unable to comply with the underlying court order.[15] When such an error occurs, the sanction

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[14] Some courts, like the Tenth Circuit in *Walker*, have reached this conclusion only after conducting the balancing test described in *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976). *See Walker*, 768 F.2d at 1183-1185. Such an analysis is unnecessary in light of this Court's settled holdings that actual imprisonment triggers the right to counsel. *See, e.g., Shelton*, 535 U.S. at 661; *see also Lassiter*, 452 U.S. at 27-31 (applying *Mathews* to determine existence of a right to counsel only after concluding that the proceeding in question would *not* result in the litigant's actual incarceration). Even applying *Mathews*, however, the balance of factors tips sharply in favor of finding a right to counsel whenever a litigant faces actual incarceration. *See Walker*, 768 F.2d at 1183-1185.

[15] Because civil contempt differs from criminal contempt principally by its coercive character and purpose, *see Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441-442 (1911), its justification "depends upon the ability of the contemnor to comply with the court's order," *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). "Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." *United States* v. *Rylander*, 460 U.S. 752, 757 (1983). As the Court has recognized, "to jail one for a contempt for omitting an act he is powerless to perform would ... make the proceeding

of imprisonment—even if theoretically conditional—in reality is not conditional at all. It is, in effect, an absolute and punitive deprivation of "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality).

Second, the state supreme court ignored that a defendant facing a civil contempt sanction has just as great a need for the assistance of counsel as a defendant facing incarceration in any other proceeding. The assistance of counsel is necessary for a defendant to establish his defenses to contempt, including any present inability to comply with the court order. Mounting such a defense is hardly straightforward. For example, in the child-support context, a defendant might attempt to testify as to his inability to pay, but, as this case illustrates, such testimony alone is unlikely to rebut the presumption of willful nonpayment. Rather, to carry his burden, the defendant may need to present proof of his inability to comply, potentially including competent evidence not only of his employment (or unemployment), but also of his subsistence needs, assets, and, in some jurisdictions, inability to borrow the funds.[16] He

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purely punitive, to describe it charitably." *Maggio* v. *Zeitz*, 333 U.S. 56, 72 (1948); *see also Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 638 n.9 (1988) ("Our precedents are clear ... that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order."). Consistent with this Court's cases, South Carolina law precludes the incarceration of a contemnor who cannot comply with the underlying court order. *See supra* p. 6.

[16] *See, e.g.*, Tex. Fam. Code Ann. § 157.008(c) (inability-to-pay defense is available only if the obligor has "attempted unsuccessfully to borrow the funds needed" and "kn[ows] of no source from which the money could have been borrowed or legally obtained").

may need to call and examine witnesses. And an obligor with some limited income or assets available might be required to demonstrate what portion of the arrearage he could pay and what portion is beyond his means.

A defendant is unlikely to be able to make this showing or establish other defenses without a lawyer's help.[17] As this Court has noted, a defendant facing incarceration often "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Powell*, 287 U.S. at 69; *see also Gault*, 387 U.S. at 36. The Court has thus recognized the right to counsel as uniquely important:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. ... If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel ... it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

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[17] Other defenses requiring the assistance of counsel might include, for example, deficiencies in the rule to show cause, *see Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986); errors in the amount claimed to be owed; invalidity of the underlying support order (due to lack of jurisdiction in the court that entered the order or fraud in obtaining the order); or the defendant's substantial compliance or good-faith efforts to comply, *see Tracy* v. *Tracy*, 682 S.E.2d 14, 18 (S.C. Ct. App. 2009); *Abate* v. *Abate*, 660 S.E.2d 515, 519 (S.C. Ct. App. 2008). In addition, a lawyer may play a critical role in persuading the court to consider a suspended sentence or alternatives to incarceration, such as job training, job placement, or vocational rehabilitation programs. *See* S.C. Code Ann. §§ 63-17-490, 63-17-500.

Powell, 287 U.S. at 68-69.[18] That reasoning applies with equal force in the civil contempt context.

Third, drawing a line between civil and criminal proceedings for purposes of applying the right to counsel, as the decision below would do, is unlikely to prove workable in the contempt context. As this Court has acknowledged, the line between criminal and civil contempt is not easy to divine. *See International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 827 (1994); *id.* at 845 (Ginsburg, J., concurring); Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1033 (1993) (the distinction is "conceptually unclear and exceedingly difficult to apply"). Most contempt proceedings "are neither wholly civil nor altogether criminal," and "'it may not always be easy to classify a particular act as belonging to either one of those two classes.'" *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). Distinguishing the two requires examination not only of the terms of the contempt order and sentence, but of the essential "charac-

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[18] While some protections that would be available in a criminal contempt proceeding would not apply in civil contempt proceedings, *see Bagwell*, 512 U.S. at 827 (right to a jury trial; right to proof beyond a reasonable doubt), the right to counsel is uniquely indispensable for a civil contemnor facing incarceration. *See Custis* v. *United States*, 511 U.S. 485, 496 (1994) ("failure to appoint counsel for an indigent defendant [is] a unique constitutional defect"). As this Court has observed, no defendant should "face[] incarceration on a conviction that has never been subjected to the crucible of meaningful adversarial testing." *Shelton*, 535 U.S. at 667 (internal quotation marks omitted). In particular, the assistance of counsel is uniquely helpful in guarding against the erroneous incarceration of a civil contemnor who is unable to comply with the court's order.

ter and purpose" of the sanction. *Id.*; *see also Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 635-641 (1988). While the determination is one of federal law, *Hicks*, 485 U.S. at 630, features of the applicable state contempt law may muddy the water.[19] And as this case illustrates, even when the contempt sentence is in theory a "classic civil contempt sanction" (App. 3a), the circumstances may render a conditional and coercive sentence purely punitive in fact when the defendant cannot comply with the court's order.[20]

The Supreme Court of South Carolina's decision is thus irreconcilable with this Court's precedent, and the Court should grant the petition and reverse the judgment below.

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[19] The South Carolina contempt statute does not distinguish between civil and criminal contempt. *See supra* n.1. Under state law, the nature and purpose of the sanction are dispositive. *Poston* v. *Poston*, 502 S.E.2d 86, 88 (S.C. 1998).

[20] Thus, even if this Court were to recognize an exception to the right to counsel for contempt proceedings that are truly civil in character and purpose, Turner should still have been afforded counsel on the facts of this case because his sentence was wholly punitive. There was no coercive force to Turner's incarceration because he had no ability to pay. Not only had Turner previously been jailed on several occasions on the same child support order, but it is undisputed that he was indigent. The sentence was thus purely punitive and criminal—effectively a sentence to twelve months in debtors' prison. *See Maggio*, 333 U.S. at 72. Turner was therefore entitled to counsel. *See Cooke*, 267 U.S. at 537.

III. The Question Presented Is An Important And Recurring One, And This Case Is An Appropriate Vehicle For Resolving It

The right-to-counsel question at issue in this case was squarely presented to and passed upon by the Supreme Court of South Carolina. App. 2a-5a, 11a-15a. And because the question arises on direct review of a contempt judgment, this case presents none of the extraneous issues that might prevent the Court from deciding the issue if the case arose in habeas or in a suit for injunctive relief under 42 U.S.C. § 1983.[21] The decision below is thus a particularly appropriate vehicle for clarifying the scope of the right to counsel in civil contempt proceedings.

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[21] Although Turner was released from jail after serving the full sentence imposed by the family court, his right to counsel claim is not moot. Turner remains indigent and faces a substantial risk of again being held in contempt and incarcerated without appointed counsel. By law, he cannot be incarcerated on any one contempt order for more than twelve months, and many of his jail terms have been shorter than that. Contempt orders of such short duration could easily escape appellate review. This case therefore fits squarely within the "capable of repetition, yet evading review" exception to mootness. *See, e.g.*, *Leonard* v. *Hammond*, 804 F.2d 838, 842-843 (4th Cir. 1986); *Walker*, 768 F.2d at 1182; *Bradford*, 1986 WL 2874, at *3; *Mead*, 460 N.W.2d at 496. Indeed, Turner's incarceration was not merely *capable* of repetition, but in fact has been repeated. In early 2009, shortly after his release from the contempt sentence imposed in the order under review, Turner was again brought before the family court, without counsel, and jailed for several more months on civil contempt charges. Contempt proceedings recurred in early 2010. (On that occasion, however, Turner was assisted by volunteer *pro bono* counsel, who was able to negotiate a suspended jail sentence contingent on Turner's completion of a substance abuse treatment program.)

Moreover, the question presented in this case is not only of significant legal importance, but of great practical urgency as well. In 2005, in South Carolina alone, approximately 1,500 people were incarcerated at any given time for nonpayment of child support.[22] Incarceration of indigent noncustodial parents for nonpayment of child support in proceedings similar to those conducted in South Carolina is a common practice.[23]

Moreover, child-support arrears are disproportionately owed by parents with low or no reported earnings, and such parents are routinely incarcerated for contempt. One recent study concluded that 70 percent of unpaid child-support obligations in nine States was owed by obligors who earned either no income or income of $10,000 per year or less.[24] Another report similarly found that "most of the [arrears] are owed by extremely poor debtors."[25] Indeed, in IV-D cases, the

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[22] Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 117 (2009).

[23] *See* May & Roulet, Ctr. for Family Pol'y & Prac., *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices* 10-38 (2005), *available at* http://www.cffpp.org/publications/pdfs/noncompliance.pdf.

[24] Sorensen et al., Urban Inst., *Assessing Child Support Arrears in Nine Large States and the Nation* 3 (2007), *available at* http://www.urban.org/url.cfm?ID=1001242; *see also* Office of Child Support Enforcement, *Child Support Enforcement FY 2007 Annual Report to Congress*, *available at* http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/fy2007_annual_report/ (last visited June 23, 2010).

[25] Office of Child Support Enforcement, *Child Support Enforcement FY 2002 Preliminary Data Report* (2003), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_

very fact of an arrearage is often evidence that the obligor lacks sufficient income or assets to cover the child-support payments, because automated enforcement tools otherwise would likely have detected them. Accordingly, the civil contemnors most affected by the state supreme court's decision denying a right to appointed counsel are those who could most likely establish a successful inability-to-pay defense if only they had the assistance of a lawyer to present it.

Absent this Court's intervention, indigent contempt defendants in South Carolina and the other states that have rejected the right to counsel will continue to face incarceration without a lawyer's assistance in violation of this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

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datareport/. Other studies have documented the reason for that debt: A substantial proportion of obligors face significant barriers to employment. Many have only a high school education or less, and only one in five work full-time in a given year due to many factors, including health problems, criminal records, and substance abuse issues. Patterson, *supra* n.22, at 106; Sorensen, Urban Inst., *Obligating Dads: Helping Low-Income Noncustodial Fathers Do More For Their Children* 4 (1999), *available at* http://www.urban.org/publications/309214.html.

Respectfully submitted.

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JUNE 2010

APPENDICES

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

REBECCA PRICE,

Respondent,

v.

MICHAEL D. TURNER,

Appellant.

Appeal from Oconee County
Timothy M. Cain, Family Court Judge

Opinion No. 26793
Submitted February 4, 2010
Filed March 29, 2010

AFFIRMED

CHIEF JUSTICE TOAL: In this case, Michael R. Turner (Appellant) appeals the family court's order holding Appellant in contempt of court for failure to pay child support. We certified the appeal pursuant to Rule 204(b), SCACR, and affirm.

FACTUAL/PROCEDURAL BACKGROUND

In January 2008, Appellant appeared in family court on a rule to show cause for failure to pay child

support. Appellant was not represented by counsel. At the time of the hearing, Appellant owed nearly six thousand dollars in child support payments and had not made a payment in a year and a half. Appellant testified that his failure to pay was due to incarceration, drug addiction, unemployment, and injury. The court found Appellant in willful contempt of the child support order and sentenced him to twelve months in a detention center, which sentence he could purge himself of and avoid by full payment of his child support arrearage.

Appellant appealed the family court's order to the court of appeals. This Court certified the case pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

A finding of contempt rests within the sound discretion of the trial judge. *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (citation omitted). Such a finding should not be disturbed on appeal unless it is unsupported by the evidence or the judge has abused his discretion. *Id.*

LAW/ANALYSIS

Appellant argues the Sixth and Fourteenth Amendments of the United States Constitution guarantee him, as an indigent defendant in family court, the right to appointed counsel before being sentenced to one year imprisonment for civil contempt. We disagree.

The purpose of civil contempt is to coerce the defendant to comply with the court's order. *Poston v. Poston*, 331 S.C. 106, 111, 502 S.E.2d 86, 88 (1998). In contrast, criminal contempt is intended to punish a

party for disobedience and disrespect. *Id.* Civil contempt sanctions are conditioned on compliance with the court's order. *Id.* at 112, 502 S.E.2d at 89. Criminal contempt sanctions are unconditional. *Id.* at 111, 502 S.E.2d at 88. Thus, when the court orders imprisonment for contempt, whether the sanction is civil or criminal depends upon whether the sentence is conditional or for a definite period. *Id.* at 111-12, 502 S.E.2d at 89. A contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do. *Id.* at 112, 502 S.E.2d at 89. This distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards not mandated in civil contempt proceedings. *See Miller v. Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 761 (Ct. App. 2007).

Here, the family court judge found Appellant in willful contempt of the support order and sentenced him to twelve months in a detention facility, stating, "He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release."[1] This conditional sentence is a classic civil contempt sanction. Therefore, Appellant is not constitutionally entitled to appointment of counsel.[2]

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[1] This sentence is statutorily permitted by S.C. Code Ann. § 63-3-620, which provides for, among other penalties, imprisonment for up to one year for contempt of court.

[2] We recognize that in holding a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position. Several jurisdictions have held that appointment of counsel is not constitutionally required before a civil

CONCLUSION

We hold that Appellant does not have a constitutional right to appointed counsel before being incarcerated for civil contempt for nonsupport. Because Appellant may avoid the sentence altogether by complying with the court's previous support order, he holds the keys to his cell door and is not subject to a permanent

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contemnor may be incarcerated. *See Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983) (holding due process did not require appointment of counsel in civil contempt proceeding where father had ability to pay but willfully refused to do so); *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980) (finding a defendant in family court is not entitled to appointment of counsel before being jailed for civil contempt for nonsupport); *Duval v. Duval*, 322 A.2d 1 (N.H. 1974) (holding court has discretion to appoint counsel in nonsupport civil contempt hearing, but is not constitutionally mandated); *State ex rel. Dep't of Human Servs. v. Rael*, 642 P.2d 1099 (N.M. 1982) (holding due process does not require appointment of counsel in all cases of civil contempt for nonsupport). The majority of courts that have considered this issue have determined indigent defendants do have a right to appointment of counsel before being incarcerated for civil contempt. *See e.g., Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *United States v. Bobert Travel Agency, Inc.*, 699 F.2d 618 (2d Cir. 1983); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973); *Johnson v. Zurz*, 596 F. Supp. 39 (N.D. Ohio 1984); *Ex parte Parcus*, 615 So. 2d 78 (Ala. 1993), *Black v. Div. of Child Support Enforcement*, 686 A.2d 164 (Del. 1996); *May v. Coleman*, 945 S.W.2d 426 (Ky. 1997); *Rutherford v. Rutherford*, 464 A.2d 228 (Md. 1983); *Mead v. Batchlor*, 460 N.W.2d 493 (Mich. 1990); *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984); *McBride v. McBride*, 431 S.E.2d 14 (N.C. 1993); *State ex rel. Gullickson v. Gruchalla*, 467 N.W.2d 453 (N.D. 1991); *Pasqua v. Council*, 892 A.2d 663 (N.J. 2006); *Russell v. Armitage*, 697 A.2d 630 (Vt. 1997); *Tetro v. Tetro*, 544 P.2d 17 (Wash. 1975). However, we are persuaded that the minority position held by Florida, Maine, New Hampshire, and New Mexico is sound and in keeping with controlling precedent.

or unconditional loss of liberty. We affirm the family court's ruling.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

APPENDIX B*

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Rebecca Price
PLAINTIFF

vs.

Michael D. Turner
DEFENDANT

ORDER FOR CONTEMPT OF COURT

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 JAN 3 A 10:51]

FILE NO: 2003-DR-37-472
HEARING DATE 1/3/08
ATTY FOR PLAINTIFF
ATTY FOR DEFENDANT
JUDGE Cain
COURT REPORTER Lesa Williams
GUARDIAN AD LITEM

Pursuant to (Rule to Show Cause) (Bench Warrant), this matter was heard on the date shown above. Plaintiff (did) (did not) appear. Defendant (did) (did not) appear. I find the Defendant owes a support balance of $5728.76 as of the hearing date. I find that the Defendant's failure to make support payments when due

* Original form completed by hand.

(was) (was not) willful. My conclusions are based on the following facts:

( ) Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due.

( ) Defendant (has) (does not have) a physical or mental impairment which (prevents) (does not prevent) defendant from being gainfully employed.

( ) Other:_____

_____

_____

_____

Therefore, I find:

___ Defendant is not in contempt of this court.

___ Defendant is in contempt of court, and I order that Defendant be confined to the Oconee County Detention Center.

Defendant may purge himself/herself of contempt and be released from confinement by:

___ continue payments as previously ordered.

___ payment of fine of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of court costs related to this proceeding of $_____ to the Oconee County Clerk of Court on or before _____.

✓ payment of ~~$-0-~~ Balance on acct to the Oconee County Clerk of Court on or before release to apply against outstanding account balance.

✓ Lien on any SS claim or SSI_____

_____

Confinement shall commence

___ immediately

___ if fine, court costs, or payment to account balance is not made as ordered above

✓ the entire period of confinement shall be served (no work time or good time credit to be given)

PROVIDED that the period of confinement shall not exceed one (1) year or 12 mths

IT IS FURTHER ORDERED that Defendant shall:

___ pay the sum of $____ (plus 5% court costs) per _____ to apply against arrearages, commencing _____, in addition to previously ordered support payments

IT IS FURTHER ORDERED

___ enforcement of collection of the support arrearages shall be held in abeyance until further order of the Court.

___ the Clerk of Court shall implement wage withholding immediately.

___ this order shall serve as a bench warrant for the arrest of above named defendant, with confinement until brought before the Court for a hearing.

___ defendant to be immediately released from Oconee County Detention Center

✓ Work release eligible _____

_____

IT IS FURTHER ORDERED that at all times the parties shall advise the Clerk of Court of their current residence and mailing addresses, telephone numbers, and current employers.

Walhalla,
South Carolina

Dated: 1/3/08

[s/ Illegible signature]
PRESIDING JUDGE
THE FAMILY COURT OF THE
TENTH JUDICIAL CIRCUIT

[STAMP: A TRUE COPY
FEB 5 2008
SALLIE C. SMITH
CLERK OF COURT—OCONEE COUNTY]

APPENDIX C

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Timothy M. Cain, Family Court Judge

REBECCA PRICE,
RESPONDENT,

V.

MICHAEL [D.] TURNER,
APPELLANT

FINAL BRIEF OF APPELLANT

[STAMP: RECEIVED
AUG 19 2008
SC COURT OF APPEALS]

STATEMENT OF ISSUES ON APPEAL

1. Is a defendant in family court entitled to counsel before receiving a one year active sentence for contempt resulting from failure to pay child support?

STATEMENT

On January 3, 2008, Michael Turner appeared *pro se* in the Oconee County Family Court before the Honorable Timothy M. Cain on a rule to show cause in a child support case. Judge Cain found Turner in contempt and sentenced him to 12 months incarceration or payment of the remainder of the account—five thousand seven hundred twenty eight dollars and seventy

six cents ($5,728.76). (R. p. 4-5). The judge did not inform Turner that he had a right to counsel.

Turner presented evidence that he was indigent; he stated he had broken his back and was seeking disability. The trial judge made no finding as to Turner's indigent status. (R.p.4)

On January 24, 2008, Turner filed this appeal.

ARGUMENT

A defendant in family court is entitled to counsel before receiving a one year active sentence for contempt resulting from failure to pay child support.

Turner was held in contempt for failure to pay child support and sentenced to 12 months without the assistance of counsel and without being informed of his right to appointed counsel if indigent. The right to counsel under the federal constitution arises under the Sixth Amendment or under the due process guarantee of the Fourteenth Amendment. Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973) cert. denied 415 U.S. 933, 94 S.Ct. 1447, 39 L.Ed.2d 491 (1974). An indigent's right to appointed counsel imposes on the court an obligation to inform him of that right. See Miranda v. Arizona, 384 U.S. 436, 473, n.43, 86 S.Ct. 1602, 1627, n.43, 16 L.Ed.2d 694 (1965).

In Argersinger v. Hamilton, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) the Court wrote, "We hold ... that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Argersinger at 37, 92 S.Ct. at 2012. In Argersinger, the Court held that an indigent defendant who was tried for an offense carrying up to six months in jail and sentenced to a 90 day jail term was entitled to court appointed counsel.

The Court explained, "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." Argersinger at 40, 92 S.Ct. at 2014.

In Lassiter v. Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), a case involving the termination of parental rights, the Court limited the absolute holding of Argersinger to those cases where the proceedings could result in a deprivation of physical liberty. In Lassiter, the Court wrote, "... [A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." Lassiter at 26, 87 S.Ct. at 2159. The Court found that the Due Process Clause of the Fourteenth Amendment did not automatically require the appointment of counsel for indigent parents in every termination of parental rights hearing. Instead, the Court found that the balancing test established in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), a social security disability claim case, should be used to determine when due process requires the appointment of counsel in termination of parental rights hearings.

Turner was found in contempt for failure to pay child support. The twelve month jail sentence imposed by the family court judge clearly deprived Turner of his physical liberty. The judge erred in failing to advise Turner of his right to counsel. Judge Cain's order states that Applicant may purge himself and end his incarceration upon payment of the balance of his arrearage. (R. p. 5).

The designation of "civil" versus "criminal" contempt does not obviate the right to counsel. In Walker

v. McLain, 768 F.2d 1181 (10th Cir. 1985), the court wrote, "It would be absurd to distinguish criminal and civil incarcerations; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used. In addition, the line between criminal and civil contempt is a fine one, and is rarely as clear as the state would have us believe. The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty." Walker at 1183, citing Ridgway v. Baker, 720 F.2d 1409, 1413 (5th Cir. 1983).

The inclusion of a purge clause does not remove the right to counsel. Recognizing that the defendant's right to appointed counsel diminishes as his interest in personal liberty diminishes, as noted in Lassiter, the Tenth Circuit Court of Appeals wrote:

> However, petitioner's liberty interest cannot be viewed as conditional. If petitioner is truly indigent, his liberty is no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison if he cannot afford the price. The fact that he should not have been jailed if he is truly indigent only highlights the need for counsel, for the assistance of a lawyer would have greatly aided him in establishing his indigency and ensuring that he was not improperly incarcerated. The argument that the petitioner has the keys to the jailhouse door does not apply to diminish petitioner's liberty interest.

Walker v. McLain, 768 F.2d at 1184.

In Walker, the court found that the contempt sentence for failure to pay child support was obtained in

violation of the petitioner's due process rights because the court failed to warn the petitioner of his right to appointed counsel if indigent. Several other circuit courts of appeals have held that the Due Process Clause of the Fourteenth Amendment requires that an indigent defendant in a nonsupport proceeding may not be incarcerated if he has been denied the assistance of counsel. Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984) (en banc); Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973) (in dicta). The federal district courts have reached similar results. McKinstry v. Genesee Co. Circuit Judges, 669 F.Supp 801 (E.D. Mich. 1987); Johnson v. Zurz, 596 F.Supp. 39 (N.D. Ohio 1984); Lake v. Speziale, 580 F.Supp. 1318 (D. Conn. 1984); Young v. Whitworth, 522 F.Supp. 759 (S.D. Ohio 1981); Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D. Ohio 1981).

In McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993) the North Carolina Supreme Court wrote, "In light of the Supreme Court's opinion in Lassiter, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages." McBride at 19. A majority of state courts have reached similar results. Burton v. Hootman, 2007 WL 404359 (Ohio TR. 2007); Otton v. Zaborac, 525 P.2d 537 (Alaska 1974); Dube v. Lopez, 40 Conn.Sup. 111, 481 A.2d 1293 (1984); In re Marriage of Stariha, 59 N.E.2d 1117 (Ind.Ct.TR. 1987); McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982); Rutherford v. Rutherford, 296 Md. 347, 464 A.2d 228 (1983); Mead v. Batchlor, 435 Mich. 480, 460 N.W.2d 493 (1990); Cox v. Slama, 355 N.W.2d 401 (Minn. 1984); Ex Parte Martinez, 775 S.W.2d 455 (Tex.Ct.TR. 1989), overruled on

other grounds by Ex Parte Linder, 783 S.W.2d 754 (Tex.Ct.TR. 1990); Tetro v. Tetro, 86 Wash.2d 252, 544 P.2d 17 (1975); Ferris v. State ex rel. Maass, 75 Wis.2d 542, 249 S.W.2d 789 (1977); Pasqua v. Council, 186 N.J. 127, 892 A.2d 663 (N.J. 2006); contra Mann v. Hendrian 871 F.2d 51 (7th Cir. (Ill.) 1989).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that an indigent defendant in family court can not be sentenced to a period of incarceration for contempt resulting from failure to pay child support without the appointment of counsel. Turner's one year contempt sentence for failure to pay child support was obtained in violation of his due process rights because the court failed to warn the petitioner of his right to appointed counsel if indigent. The finding of contempt should be vacated and the case remanded to the family court.

CONCLUSION

Based on the above argument, the appeal should be granted.

Respectfully submitted,

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Greenville, SC 29605
864-242-0029

ATTORNEY FOR PETITIONER

This 19th day of August, 2008.

APPENDIX D

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT OF THE
TENTH JUDICIAL CIRCUIT
DOCKET NO.: 03-DR-37-472

Rebecca Price,
PLAINTIFF

-vs.-

Michael D. Turner,
DEFENDANT

January 3, 2008

OCONEE, SOUTH CAROLINA

TRANSCRIPT OF RECORD

[Tables and certificates omitted]

BEFORE:

THE HONORABLE TIMOTHY M. CAIN, JUDGE

APPEARANCES:

Rebecca Price
Appeared Pro Se

Michael D. Turner
Appeared Pro Se

The Clerk: This is Case 2003-DR-37-472, Rebecca Price versus Michael D. Turner. Mr. Turner's pay-

ments are weekly in the amount of Seventy-five Thirty-two ($75.32). This includes Twenty dollars ($20.00) on arrears. He has an account balance of Five Thousand Seven Hundred and Twenty-eight dollars and Seventy-six cents ($5,728.76). The last payment we show of record was August 25, 2006.

The Court: Sir, are you Michael D. Turner?

Mr. Turner: Yes, sir.

The Court: You solemnly swear or affirm to tell the truth, so help you God?

Mr. Turner: Yes, sir.

The Court: Is there anything you want to say?

Mr. Turner: Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me.

The Court: Okay. Ma'am, you are Rebecca Price?

Ms. Price: Yes, sir.

The Court: Is there anything you want to say?

Ms. Price: Yeah. I have just found out about the SSI. He has claimed my daughter on all of that, and—

Mr. Turner: No, I didn't.

The Court: Well, just—

Ms. Price: I don't know what the, cause you know, he's not paying child support. He don't see my daughter. I don't see how you could go behind my back and claim her on disability and SSI as a dependent.

Mr. Turner: I didn't claim her as a dependent, just that I owed child support to her.

The Court: Okay.

Mr. Turner: They asked me how many kids I had—

The Court: Okay. If there's nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I'm gonna sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release. I've also placed a lien on any SSI or other benefits.

Mr. Turner: Do I still get my work credits and good time?

The Court: No good time or work credits. If you've got a job, I'll make you eligible for work release.

Mr. Turner: Why can't I have work credits or good time?

The Court: Because that's my ruling.

End of Transcript

APPENDIX E*

STATE OF SOUTH CAROLINA
COUNTY OF Oconee

IN THE FAMILY COURT
10 JUDICIAL CIRCUIT
ADMINISTRATIVE PROCESS
ORDER OF FINANCIAL RESPONSIBILITY

CSED Case Number: 482527
Docket Number: 2003-DR.37.472

South Carolina Department of Social Services,
Obligee,

vs.

Michael D. Turner,
Obligor.

Conference Date: 6-18-03
Attorney for Obligee: _____
Attorney for Obligor: pro Se

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2003 JUN 18 P 12:38]

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1. The Custodian and Obligor in this action are:
   CUSTODIAN AFDC RECIPIENT: ☒ Yes ☐ No
   Name: Rebecca Price

* Original form completed by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

Residence and/or Mailing Address:
{XXXXXXXXXX}
{XXXXXXXXXXXXXX}

Telephone: 864-{XXX-XXXX}
Sex: F DOB: {X-XX-79}
Social Security Number: {XXX-XX-XXXX}

DLN: _____ Exp. Date: _____
Employer: _____

Telephone: _____

OBLIGOR:

Name: Michael D. Turner
Residence and/or Mailing Address:
{XXXXXXXXXX}
{XXXXXXXXXXXXX}

Telephone: 864-none
Sex: M DOB: {X-XX-77}
Social Security Number: {XXX-XX-XXXX}
DLN: {XXXXXXXXX} Exp. Date: 1-19-08
Employer: unemployed

Telephone: _____

2. The Obligor acknowledges proper service of the Notice of Financial Responsibility or waives any defects; the Obligor waives a court hearing;

☒ The Obligor is the natural parent of and owes a duty of support to the following dependent child(ren):

☐ The Obligor admits to being the natural father of the dependent child(ren) listed below. By this Order, the Obligor is found to be the father of and owes a duty of support to the dependent child(ren) listed below.

Name	DOB	Social Security Number
{B.L.P.}	{X-XX-96}	{XXX-XX-XXXX}

3. ☒ Paternity tests were conducted for the child(ren) {B.L.P.}. The paternity tests indicate a 99.99 percent probability of paternity for the above-named child(ren). The Obligor owes a child support arrearage of $206.92, for child support set retroactive to 5-14-03.

4. The Obligor agrees to pay $_____ for genetic testing to the Child Support Enforcement Division, P.O. Box 1520, Columbia, S.C. 29202-1520, no later than _____.

5. ☐ Obligor was served on _____.

☐ Obligor waives thirty (30) days notice.

6. The Obligor's gross monthly income is $1386. The custodian's gross monthly income is $0. Day care expenses for the child(ren) are $0 per _____. The cost of insurance is $0 per _____ which is

paid by the _____.

7. A prior order in this case dated _____ from _____ required the Obligor to pay $_____ per _____ in support for his/her child(ren). The Obligor owes a child support arrearage of $_____.

8. The Obligor shall pay, through the Court, child support payments of $51.73, plus $5.00 toward the arrearage, plus three percent (3 5%) court costs, for a total weekly payment of $59.72, beginning 7-11-03.

9. The Obligor's child support obligation shall continue until the child support/arrears are fully paid. The Obligor shall pay the amount as ordered until the minor child(ren) reach(es) the age of emancipation; or, until the child(ren) become(s) otherwise emancipated, **as may be determined by the Court**. This does not prevent anyone from seeking a post-secondary education support order.

10. Each payment shall be made payable to the Oconee County Family Court, shall contain the Family Court file number, and the Obligor's full name.

11. ☐ The Obligor shall provide and maintain health insurance coverage for the child(ren) and shall provide proof of coverage to the CSED by _____. The Obligor agrees to notify the CSED when health insurance is changed.

☒ Insurance is not reasonably available; however, should the Obligor obtain medical insurance in the future, this case may be reviewed for modification at the request of the Obligor or Obligee.

☐ The Obligor shall pay ___% of all unreimbursed health expenses in excess of $250 per year per child. The custodian shall assume the costs of the unreimbursed medical expenses up to $250 per year per child.

☒ Qualified Medical Child Support Order(s) may be submitted as needed.

12. All future notices or correspondence shall be sent to the Obligor and custodian at the address above. The Obligor and the custodian shall advise the Court, within ten (10) days, of every change in mailing address or employment. Failure to do so can result in future hearings being held in your absence.

13. Income withholding is ordered pursuant to S.C. Code Ann. § 20-7-1315.

14. Any party may request, in writing, a review of his/her child support order for possible adjustment thirty-six (36) months from the date of this order or thirty-six (36) months from the date of the last review of this order. A written request for review must be made to the South Carolina Department of Social Services, Child Support Enforcement Division.

15. Pursuant to the Uniform Interstate Family Support Act and S.C. Code Ann. § 20-7-960 et seq., this State has continuing, exclusive jurisdiction over this order.

16. Failure to pay your child support obligations may result in any or all of the following actions: the revocation of any licenses you hold; the reporting of your delinquent status to the credit bureau; the interception of your federal and state income tax

refunds; the interception of any other payments due to you from the federal government; and/or an action for contempt of court which may result in punishment by a fine, a public work sentence, imprisonment, or any combination of them. Further, a bench warrant may be issued for your arrest.

17. _____

_____

_____

I voluntarily consent to this order.

Dated: June 18, 03 /s/ Michael Turner
Obligor

Dated: June 18, 03 /s/ Rebecca Price
~~Obligor's Attorney~~
Obligee

Dated: 6-18-03 /s/ Diggs O. Hill
Authorized Designee,
Child Support
Enforcement Division

Copy
Received By: /s/ Michael Turner June 18, 2003
Obligor Date

South Carolina Department of Social Services

CHILD SUPPORT OBLIGATION: WORKSHEET A

Rebecca Price (Name of Plaintiff) vs. Michael D. Jones (Name of Defendant) 482522 (File Number)

		Father	Mother	
1.	Monthly Gross Income	1386		1482
2.	Monthly Alimony (Pre-Action)			
	a. To Be Received			
	b. To Be Paid			
3.	a. Other Monthly Alimony or Child Support Paid (If Having Made Over The Action)	408.75		
	b. Adjustment For 2 Other Child(ren) In the Home	302		
4.	Adjusted Monthly Gross Income	684		1482 (Combined Monthly Adjusted Gross Income)

Number of Children To Be Supported By Order In This Action: 1

5.	Basic Combined Child Support Obligation (From Schedule Using Combined Monthly Adjusted Gross Income From #4)		224
6.	Adjustment to Basic Child Support Obligation		
	a. Health Insurance Premium (Prefer County Children Only)	6	
	b. Child(ren)'s Extraordinary Medical Expenses		
	c. Work Related Child Care Costs Adjusted For Federal Tax Credit		9
	Actual _____ x 0.75 = (0.75 adjusts for Federal Tax Credit, but does not apply to certain income levels; see instructions.)		
	Total Adjustment to Basic Combined Child Support Obligation	6	
7.	Total Combined Monthly Child Support Obligation. Net		224

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2003 DP 37 172

8.	Proportional Share of Combined Monthly Adjusted Gross Income	120 %	%
9.	Gross Child Support Obligation of Individual Parent (Name)	224	

Complete Items 10-11 for Noncustodial Parent Only

Noncustodial Parent is (Check One): ☒ Father ☐ Mother

10.	Credit for Adjustment to Basic Combined Child Support Obligation. (From Item 6C in Item 9A)	0 (Same as Item 6C)	(Same as Item 6C)
	224 ÷ 4.33 = 51.73		
11.	Net Child Support To Be Paid To Custodial Parent	224	
	51.73 x 52 = 5445		

Date: 6-18-03 Worksheet Prepared By: DCA for ☐ Father ☐ Mother

Note: If deviation from the Guidelines is necessary, please specify reasons under.

DSS Form 2711 (JUL 90 Edition or JAN 90 is obsolete.

OPPOSITION BRIEF

No. 10-10

IN THE
Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS [AND LARRY E. PRICE, SR.],
Respondent[s].

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT[S]' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, a child's indigent mother appeared *pro se* in a civil-contempt action to enforce a child-support decree against the child's father. Though he held multiple jobs during the years following the child-support order, the father repeatedly failed to pay child support. Often, payments were made only after he was faced with the prospect of being jailed for civil contempt. At his sixth civil-contempt hearing, he blamed his failure to pay primarily on his prolonged use of illegal drugs. The question presented is:

In a civil action by a *pro se* mother to enforce a child-support order, does the father have an absolute right under the Sixth or Fourteenth Amendment to have a court *sua sponte* appoint counsel to represent him before he can be jailed for civil contempt, for a limited time or until he complies with the court's order?

PARTIES TO THE PROCEEDING

Petitioner Michael D. Turner is the father of B.L.P. and was the defendant and appellant in the courts below. Rebecca L. Price, the mother of B.L.P. and the only plaintiff and respondent in the courts below, is the proper respondent here. She now uses her married name, Rebecca L. Rogers, which she lists in the caption and uses throughout this brief. Petitioner still owes child-support payments to Mrs. Rogers.

Because of her indigence, Rebecca L. Rogers had to relinquish physical custody of B.L.P. to her parents, Judy and Larry E. Price, Sr. Accordingly, in May 2009, the Oconee County Family Court redirected future child-support payments from Rebecca Rogers to Judy Price. Judy Price passed away in June 2010, so her widower Larry E. Price, Sr., now has sole physical custody of his granddaughter B.L.P., and the family court has redirected future child-support payments to him. Larry E. Price, Sr., therefore is filing, contemporaneously with this brief, a motion to intervene as an additional named respondent. He will neither file any separate briefs nor move for divided argument, but simply wishes to join in the arguments made by his daughter because of his monetary interest in the outcome of this case.

Petitioner seeks to add another respondent, the South Carolina Department of Social Services (DSS). Pet. ii. Though petitioner's counsel served his state appellate brief on the South Carolina Attorney

General's Office, neither that office nor DSS entered an appearance or filed a brief below in this contempt proceeding. Neither was listed as a defendant or respondent in any of the judgments, orders, or opinions in the record on appeal. Moreover, this case does not draw into question the constitutionality of any South Carolina statute or rules, which are silent on the question presented. Pet. 6. Thus, 28 U.S.C. § 2403(b) and S. Ct. R. 29.4(c) do not apply. Even if they did, the State would have at most the option of intervening. Because it has chosen not to intervene, the State is not a party to this suit. S.C. DSS Br. in Opp. 1-3; *see also United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2234 (2009). Thus, the Clerk of this Court has correctly declined to list DSS as a respondent on the docket-sheet caption.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

REASONS FOR DENYING THE PETITION 1

STATEMENT OF THE CASE 2

I. STATUTORY BACKGROUND OF CHILD-SUPPORT ENFORCEMENT 2

II. FACTS 6

III. PROCEDURAL HISTORY 8

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. COURTS ARE NOT DIVIDED ON WHETHER, WHEN A MOTHER SEEKS TO ENFORCE A CHILD-SUPPORT ORDER *PRO SE*, A COURT MUST *SUA SPONTE* APPOINT COUNSEL BEFORE JAILING A NONPAYING FATHER FOR CIVIL CONTEMPT 12

II. A NUMBER OF GRAVE VEHICLE PROBLEMS WOULD LIKELY PREVENT THIS COURT FROM REACHING AND RESOLVING THE QUESTION PRESENTED 20

III. THE DECISION BELOW IS CORRECT 24

A. The Sixth Amendment Right to Counsel Is Limited to "Criminal Prosecutions," in Which Defendants Face Prosecutors' State Power as Well as Criminal Stigma 24

B. Due Process Does Not Require the Appointment of Counsel in *Pro Se* Proceedings to Enforce Child Support 31

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Cases

Adkins v. *Adkins*, 248 S.E.2d 646 (Ga. 1978) 17

Alabama v. *Shelton*, 535 U.S. 654 (2002) 25

Allen v. *Sheriff of Lancaster Cty.*, 511 N.W.2d 125 (Neb. 1994) 18

Andrews v. *Walton*, 428 So.2d 663 (Fla. 1983) 15

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 27

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 24, 25

Black v. *Div. of Child Support Enforcement*, 686 A.2d 164 (Del. 1996) 14, 22 n.4

Bradford v. *Bradford*, No. 86-282-II, 1986 WL 2874 (Tenn. Ct. App. Mar. 7, 1986) 15

Burnham v. *Superior Ct. of Cal.*, 495 U.S. 604 (1990) 34

Chadwick v. *Janecka*, 312 F.3d 597 (3d Cir. 2002) 29

Choiniere v. *Brooks*, 660 A.2d 289 (Vt. 1995) 19, 22 n.5

Colson v. *State*, 498 A.2d 585 (Me. 1985) 15, 18, 22 n.4

Cnty. of Santa Clara v. *Cnty. Super. Ct.*, 5 Cal. Rptr. 2d 7 (Ct. App. 1992) 16, 22 n.5

Duval v. *Duval*, 322 A.2d 1 (N.H. 1974) 15, 22 n.4

Emerick v. *Emerick*, 502 A.2d 933 (Conn. App. 1985), *cert. dismissed*, 510 A.2d 192 (Conn. 1986), *later proceeding* 613 A.2d 1351 (Conn. App.), *cert. dismissed*, 617 A.2d 171 (Conn. 1992) 17 n.3

Ex parte Walker, 748 S.W.2d 21 (Tex. App. 1988) 17 n.3

Ferris v. *State ex rel. Maass*, 249 N.W.2d 789 (Wis. 1977) 13, 18

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 26, 28, 32

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 24, 31

Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 29, 30 n.7

Hicks ex rel. Feiock v. *Feiock*, 485 U.S. 624 (1988) 29, 30 n.7

Hudson v. *United States*, 522 U.S. 93 (1997) 30

Hunt v. *Moreland*, 697 S.W.2d 326 (Mo. Ct. App. 1985) 17 n.3

In re Calhoun, 350 N.E.2d 665 (Ohio 1976) 15, 16, 20, 22 n.4
In re Di Bella, 518 F.2d 955 (2d Cir. 1975) 14, 17
In re Gault, 387 U.S. 1 (1967) 27, 31, 32, 34
In re Grand Jury Proceedings, 468 F.2d 1368 (9th Cir. 1972) 14, 17
In re Kilgo, 484 F.2d 1215 (4th Cir. 1973) 14, 17
In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987) .. 17 n.3
In re Winship, 397 U.S. 358 (1970) 27, 32
International Union, United Mine Workers of Am. v. *Bagwell*, 512 U.S. 821 (1994) 29
Johansen v. *State*, 491 P.2d 759 (Alaska 1971) 18
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 25
Knox v. *Municipal Ct.*, 185 N.W.2d 705 (Iowa 1971) 16
Krieger v. *Commonwealth*, 567 S.E.2d 557 (Va. Ct. App. 2002) 15, 18
Lassiter v. *Dep't of Social Services*, 452 U.S. 18 (1981) ..... *passim*
Lawrence v. *Texas*, 539 U.S. 558 (2003) 28
Mann v. *Hendrian*, 871 F.2d 51 (7th Cir. 1989) 21
Mathews v. *Eldridge*, 424 U.S. 319 (1976) ..... *passim*
McBride v. *McBride*, 431 S.E.2d 14 (N.C. 1993) 20, 22 n.4
McDonald v. *City of Chicago*, 130 S. Ct. 3020 (2010) 31
McNabb v. *Osmundson*, 315 N.W.2d 9 (Iowa 1982) 14, 16, 22 n.4
Mead v. *Batchlor*, 460 N.W.2d 493 (Mich. 1990) 13
Medina v. *California*, 505 U.S. 437 (1992) 34 n.9
Middendorf v. *Henry*, 425 U.S. 25 (1976) 26, 27, 28, 33
Ne. Women's Ctr., Inc. v. *McMonagle*, 939 F.2d 57 (3d Cir. 1991) 18
Otton v. *Zaborac*, 525 P.2d 537 (Alaska 1974) 18
Pasqua v. *Council*, 892 A.2d 663 (N.J. 2006) 15
People v. *Lucero*, 584 P.2d 1208 (Colo. 1978) 14, 17
Peters-Riemers v. *Riemers*, 663 N.W.2d 657 (S.D. 2003) 17, 22 n.4
Powell v. *Alabama*, 287 U.S. 45 (1983) 25
Ridgway v. *Baker*, 720 F.2d 1409 (5th Cir. 1983) 14, 16
Rodriguez v. *Eighth Judicial Dist. Ct.*, 102 P.3d 41 (Nev. 2004) 17, 22 n.4, 35

Russell v. *Armitage*, 697 A.2d 630 (Vt. 1997) 19

Rutherford v. *Rutherford*, 464 A.2d 228 (Md. 1983) 17, 22

Sanders v. *Shephard*, 541 N.E.2d 1150 (Ill. Ct. App. 1989), *aff'd*, 645 N.E.2d 900 (Ill. 1994) ..... 17, 18, 22 n.4 & n.5

Sazama v. *State ex rel. Muilenberg*, 729 N.W.2d 335 (S.D. 2007) 18

Schmidt v. *Uhlenhopp*, 140 N.W.2d 118 (Iowa 1966) 36

Scott v. *Illinois*, 440 U.S. 367 (1979) 23

Sevier v. *Turner*, 742 F.2d 262 (6th Cir. 1984) 14

Shilitani v. *United States*, 384 U.S. 364 (1966) 29

Smeal Fire Apparatus Co. v. *Kreikemeier*, 782 N.W.2d 848 (Neb. 2010) 18

Spencer v. *Kemna*, 523 U.S. 1 (1998) 21

State ex rel. Dep't of Hum. Servs. v. *Rael*, 642 P.2d 1099 (N.M. 1982) 15, 22 n.5, 35

State v. *Dean*, 471 N.W.2d 310 (Wis. Ct. App. 1991) 36

State v. *Hudson*, 228 A.2d 132, 135 (Conn. 1967) 36

Tetro v. *Tetro*, 544 P.2d 17 (Wash. 1975) 15, 16

Turner v. *Price*, 691 S.E.2d 470 (S.C. 2010) 9, 22

Ullah v. *Enteazari-Ullah*, 836 N.Y.S.2d 18 (App. Div. 2007) 17 n.3

United States ex rel. Eisenstein v. *City of New York*, 129 S. Ct. 2230 (2009) iii

United States v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) 14, 17

United States v. *Halper*, 490 U.S. 435 (1989) 30

United States v. *Rylander*, 460 U.S. 752 (1983) 30 n.7

V.F. v. *State*, 666 P.2d 42 (Alaska 1983) 19

Vitek v. *Jones*, 445 U.S. 480 (1980) 33 n.8

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Wold Family Farms, Inc. v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719 (S.D. 2003) 18, 22 n.4

Constitutional and Statutory Provisions

U.S. Const. amend. VI ..... passim

U.S. Const. amend. XIV, § 1 ..... passim

18 U.S.C. § 3006A(b) (2006) 36

26 U.S.C. (2006) 4

28 U.S.C. § 2403(b) (2006) iii

42 U.S.C. (2006) 4

42 U.S.C. §§ 652-666 (2006) 5

42 U.S.C. § 657(a)(2)(A) (2006) 5

42 U.S.C. § 657(a)(2)(B)(i) (2006) 5

42 U.S.C. § 657(a)(7) (2006) 5

42 U.S.C. § 666 (2006) 4

Cal. Gov't Code § 27707 (2008) 36

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 4

Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7301(b), 120 Stat. 142-43 (2006) 5

Fla. Stat. § 27.52 (2010) 36

Minn. Stat. § 611.17 (2010) 36

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, tit. III, 110 Stat. 2105 (1996) 5

S.C. Code Ann. § 17-3-30 (2009) 36

Other Authorities

144 Cong. Rec. 8827 (1998) 4

155 Cong. Rec. S10,705-06 (2009) 3

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Laura Wheaton et al., The Urban Inst., *Final Report: Benefits and Costs of Increased Child Support Distribution to Current and Former Welfare Recipients* (2005) 5

Regina Brett, Editorial, *True Deadbeat Dads Guilty of Neglect*, Cleveland Plain Dealer, Dec. 7, 2005, at B1 ..... 4 n.1

S. Ct. R. 29.4(c) iii

U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007* (2009) 2, 3

REASONS FOR DENYING THE PETITION

There is no need for this Court to reach out to decide this case. Courts are not clearly divided on the question presented. Most of the decisions petitioner cites are readily distinguishable: they involve criminal cases, cases prosecuted by the State or by a plaintiff's lawyer, or more complex cases not involving child support. Petitioner does not cite a single case that unambiguously conflicts with the decision below.

Moreover, this case would be a poor vehicle for review. Among other things, petitioner has fully served his civil-contempt sentence, mooting this case. He would have been held in contempt with or without a lawyer; by his own admission, though he had nearly two years to comply, he failed to pay child support because he had indulged in illegal drugs. He never timely requested counsel, raising the issue for the first time on appeal. And, in the state courts below, petitioner raised only the categorical claim that a defendant always has a right to counsel if the court imposes even conditional incarceration for civil contempt. He never raised, and the state courts never passed on, petitioner's new claim in the alternative that South Carolina's contempt procedures are fundamentally unfair under the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976) and *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27 (1981).

Finally, the decision below is correct. The Sixth Amendment right to counsel applies only when State prosecutors pursue criminal convictions that impose criminal stigma as well as loss of liberty, unlike civil-contempt proceedings. There is no basis for a categorical right to counsel when the court imposes incarceration only until the contemnor complies with a court order. Even assuming that petitioner did not forfeit his *Mathews* claim, the due process balancing test for appointing counsel weighs in favor of keeping *pro se* defendants evenly matched with *pro se* indigent plaintiffs. Determining indigence, which is a *prerequisite* to appointing counsel, is a straightforward factual issue that does not itself require counsel. States may choose to reserve scarce indigent-defense funding for criminal cases, where the need for counsel is greatest. Further review is unwarranted.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND OF CHILD-SUPPORT ENFORCEMENT

Noncustodial parents often fail to pay the child support they owe. In 2007 alone, noncustodial parents owed $34.1 billion in child support to 6.4 million custodial parents in the United States. U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007*, at 9 (2009). The noncustodial parents paid less than

two-thirds of the amount they owed; more than 1.5 million custodial parents—and their children—received nothing at all. *Id.* at 7 tbl.2.

The nonpayment problem grows worse as the custodial parent's income declines. For single-parent families, child-support payments compose 31% of total household income; they are a dearly needed "lifeline" for struggling families. 155 Cong. Rec. S10,705-06 (2009) (statements of Senators Kohl and Rockefeller). More than 30% of custodial parents in poverty who were due child support received none whatsoever in 2007. U.S. Census Bureau, *supra*, at 8 fig.4.

Many nonsupporting parents have the means to pay but choose not to. At a congressional hearing, Senator Rockefeller observed that the average nonsupporting father who owed child support earned "close[] to $25,000" per year. *Downey-Hyde Child Support Enforcement and Assurance Proposal: Hearings Before the Subcomm. on Hum. Resources of the H. Comm. on Ways and Means*, 102nd Cong. 28 (1992). At that hearing, the Commissioner of the Massachusetts Department of Revenue reported the results of an empirical study of 72,000 absent, nonsupporting parents. Their average income "was $24,000 [in 1992 dollars], easily enough to pay the average child support order of $3,400 a year." *Id.* at 106 (statement of Mitchell Adams). Thousands of them were "successfully concealing income from the child support

enforcement agency" through self-employment or off-the-books income. *Id.* at 106-07.[1]

To combat this "abdication of moral and legal duty by deadbeat parents," 144 Cong. Rec. 8827 (1998) (statement of Rep. McCollum), Congress and the States have taken steps to enforce parents' obligations to their children. In 1984, Congress enacted the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at scattered sections of 26 U.S.C. and 42 U.S.C. (2006)). That Act required States to deduct unpaid child support from delinquent parents' tax refunds, to allow liens to be imposed on their property, and to compel employers to withhold child support from their pay. *Id.* § 3(b) (codified as amended at 42 U.S.C. § 666 (2006)).

A key component of mid-1990s welfare reform was the federal government's requirement that States implement rigorous tools to

[1] Many "deadbeat dads" avoid having sources of income that can be detected or garnished. *See, e.g.*, Christina Norland, *Unwed Fathers, the Underground Economy, and Child Support Policy*, *Fragile Families Res. Br.* No. 3, at 2 (2001) (noting that nearly 30% of nonsupporting fathers "participated in underground activity," meaning that they earned money from self-employment, off-the-books work, or criminal activity such as selling stolen goods); Abdon M. Pallasch, *State's Deadbeat Dads Owe $3 Bil.*, Chi. Sun-Times, Apr. 8, 2007, at A14 (noting that divorce lawyers joke that some fathers come down with "Acquired Income Deficiency Syndrome," meaning that they seek to avoid sources of income that can be garnished); Regina Brett, Editorial, *True Deadbeat Dads Guilty of Neglect*, Cleveland Plain Dealer, Dec. 7, 2005, at B1 ("The first thing those men do is quit working so they won't have to pay. Or they work under the table so no one can track it. . . . Some men become job-hoppers. As soon as the support bureau catches up to them, they quit and move on. It's a game of tag and the child always loses."). Though occasionally fathers are plaintiffs and mothers are defendants in child-support cases, usually the mother is the plaintiff. Thus, this brief sometimes refers to plaintiffs as "mothers" and defendants as "fathers."

enforce child-support obligations. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, tit. III, 110 Stat. 2105, 2198-2260 (1996) (codified as amended at 42 U.S.C. §§ 652-666 (2006)). Though federal law requires families on welfare to assign their child-support payments to the State to reimburse welfare costs, in recent years the focus of federal law has shifted to increasing the portion of child-support payments that custodial parents are able to collect. *See* Laura Wheaton et al., The Urban Inst., *Final Report: Benefits and Costs of Increased Child Support Distribution to Current and Former Welfare Recipients* 1 (2005). Under the federal "family first" policy, child-support payments must be distributed first to families who leave welfare before they are used to reimburse the government's welfare costs. *Id.* at 5; PRWORA § 302(a) (codified as amended at 42 U.S.C. § 657(a)(2)(A), (B)(i) (2006)). Amendments enacted in 2005 encourage States to pass some of their reimbursements back to custodial parents. For example, the 2005 amendments waive a State's obligation to share the proceeds with the federal government if they give a certain amount to the family on welfare. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7301(b), 120 Stat. 142-43 (2006) (codified at 42 U.S.C. § 657(a)(7) (2006)). Thus, increasing shares of child-support payments go directly to support children.

II. Facts

Petitioner Michael Turner fathered B.L.P., the daughter of respondent Rebecca L. Rogers (nee Price), in 1995, when petitioner was 18 and Rogers was 16. The pair drifted apart soon after B.L.P.'s birth in 1996. Rogers worked as a waitress, sought help from her parents, and received State financial assistance to support her daughter.

In January 2003, DSS notified petitioner that he had a duty to support his daughter. On June 18, 2003, the clerk of the Oconee County Family Court entered an Order of Financial Responsibility, requiring him to pay $51.73 in child support per week. Pet. App. 19a, 22a. Petitioner voluntarily consented to and signed the order. *Id.* at 24a.

Petitioner did not begin making his agreed-upon payments for months, paying nothing all summer. By September 2003 he was more than $800 in arrears, and the family court warned him that it would jail him for ninety days unless he satisfied his obligation to his daughter. Petitioner, or someone on his behalf, paid $1055.57 over the next month. The episode started a pattern in which he resisted making payments until spurred to do so by the threat of jail. In February 2004, October 2004, and once more in February 2005 the family court again ordered petitioner to serve ninety days in jail for civil contempt unless he made good on his child-support obligations. Each time, petitioner, or someone on his behalf, was able to pay the money (totaling $800.67,

$884.79, and $750.92, respectively) in the few weeks before and few days after the hearing. Though petitioner refers without citation to "at least three" periods of incarceration before the proceeding below "for terms of varying duration," Pet. 8 n.4, county jail records show that he was not jailed at all in September 2003 or February 2005. He was jailed for only two days in February 2004 and three days in October 2004, in addition to a third period discussed below.

Petitioner found construction and automotive jobs during these years, but he did not hold onto them. Oconee County Family Court records identify seven different employers for whom he worked after agreeing to make child-support payments in 2003: McGuffin's Auto Service, Weaver's Brake Service, Brook's Tire Service, Wolf Construction, Quality Construction, Tamassee Knob Car Care, and John's Painting. The court collected some money through wage withholding in 2004 and 2005, but those payments ceased by July 2005. In August 2004, after the family court began to garnish petitioner's wages, Brook's Tire replied that petitioner no longer worked there. The pattern repeated itself with Wolf Construction in June 2005 and Quality Construction the next month.

Meanwhile, the family court grew impatient with petitioner's pattern of dilatory payments. In September 2005, it issued another bench warrant and directed that he be jailed for six months unless he

made good on his child-support obligations. According to county jail records, he was jailed and released after four-and-a-half months (after deducting good-time credits). In the four-and-a-half years since April 2006, petitioner has made only five payments, totaling $425, for his daughter's care and support. By the time he appeared at his contempt hearing on January 3, 2008, he was more than $5700 in arrears.

III. PROCEDURAL HISTORY

In March 2006, the clerk of the Oconee County Family Court ordered petitioner to show cause why he should not be held in civil contempt. That same month, petitioner or someone acting on his behalf made a payment of $1404, far more than most of his other payments. When petitioner made no further payments for the next four months, the court issued a bench warrant for his arrest on July 7, 2006. Between April 2006 and January 2008 he made only three payments, all in August 2006, totaling $200. He was not arrested on the bench warrant until December 26, 2007.

On January 3, 2008, petitioner appeared in family court for a contempt hearing. Neither he nor Rogers was represented by an attorney, and petitioner never requested an attorney. He blamed his failure to pay during the preceding twenty-one-plus months primarily on his illegal drug habit, that is, "do[ing] meth, smok[ing] pot, and

everything else," and secondarily on two months' disability, for which he had filed for SSI and government disability benefits. Pet. App. 17a. He admitted that "I know I done wrong." *Id.* The court ordered petitioner jailed for twelve months or until he paid the balance he owed Rogers, whichever came first. The court also made petitioner eligible for work release and placed a lien on his SSI and other government benefits. *Id.* at 7a-8a. There is no evidence in the record that petitioner tried to take advantage of this work-release opportunity to satisfy his child-support obligation, and no record evidence of wages being withheld between 2006 and 2010.

With the help of pro bono counsel, petitioner appealed the civil contempt order. Rogers had no counsel and filed no brief.[2] Before the State's intermediate appellate court could act, the South Carolina Supreme Court certified the case to itself for direct review. Pet. App. 1a. Petitioner completed serving the full twelve-month civil-contempt sanction while his appeal was pending.

The South Carolina Supreme Court affirmed the family court's civil-contempt order. It held that defendants facing incarceration for

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[2] The South Carolina Attorney General's Office declined petitioner's attorneys' request that it file a brief on appeal, noting that the office was forbidden by law to take positions in private domestic disputes. As for DSS, it would have been a party only while it was entitled to collect any child support that Rogers received. In March 2004, DSS acknowledged that Rogers had closed her public assistance account as of July 1, 2003, and moved to have the family court send petitioner's child support payments directly to her. The court granted the motion.

civil contempt have no right to court-appointed counsel. *Id.* at 4a. It noted a crucial difference between civil and criminal contempt proceedings: the former are conditional and remedial, while the latter are unconditional and punitive. A defendant like petitioner has no right to a court-appointed attorney "because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do." *Id.* at 3a. Petitioner's "conditional sentence is a classic civil contempt sanction" because he was able to free himself by paying the child support he owed, *id.*, which he could have done, for example, through work release. Thus, the criminal-procedure protections of the Sixth and Fourteenth Amendments do not apply, *id.*, including the Sixth Amendment's right to counsel "[i]n all criminal prosecutions." U.S. Const. amend. VI.

While petitioner's appeal was pending, Rogers became unable to support her daughter any longer and had to relinquish custody to her parents. In May 2009, the family court directed that petitioner's child-support payments be paid to Rogers' mother, Judy Price. Judy died in June 2010, and the court redirected those payments to proposed respondent Larry E. Price, Sr., Rogers' father and Judy's widower. He now cares for B.L.P. and three of Rogers' other children on his own, with occasional help from other family members. To support the four children, he works intermittently as a roofer and receives foster-care

payments (although respondents' financial means are not listed in the record on appeal). *See* U.S. S. Ct. IFP Aff. of Larry E. Price, Sr. Rogers works part-time as a restaurant hostess, paying $34.26 per week to support her children, and walks five miles to and from work because she cannot afford a car. U.S. S. Ct. IFP Aff. of Rebecca L. Rogers. As of July 2010, petitioner owed the family more than $12,728 in overdue child support.

SUMMARY OF ARGUMENT

There is no square division of authority calling for this Court's review. Most of the cases cited in the petition involve criminal prosecutions, cases prosecuted by a lawyer for a government or plaintiff, or cases not involving child support. Not a single case unambiguously conflicts with the decision below.

Moreover, this case suffers from grave vehicle problems. Petitioner has served his sentence, mooting this case; there is no reason to think future cases will evade review. He also failed to raise his right-to-counsel claims in the trial court and raises his *Mathews/Lassiter* balancing-test claim for the first time in this Court. Petitioner conceded that he failed to pay because he had indulged in illegal drugs; appointing counsel thus would not have affected the outcome. And by

questioning whether the contempt was truly civil, he casts doubt on whether this case even implicates the question he has presented.

Finally, the decision below is correct. The Sixth Amendment limits the right to counsel to "criminal prosecution[s]" because they involve not only loss of liberty, but also State prosecutorial power and criminal stigma. Because proceedings like probation-revocation hearings and summary courts-martial—and *pro se* child-support cases—lack these features, they do not require counsel, even though the former can trigger months or years in prison. Due process balancing favors keeping *pro se* fathers evenly matched with *pro se* indigent mothers seeking to enforce child-support orders. Indigence is a prerequisite to appointing counsel, so the indigence determination cannot itself require counsel. And States need flexibility to conserve their scarce resources for appointed counsel in criminal cases, where the Sixth Amendment requires lawyers and where defendants need them most.

ARGUMENT

I. COURTS ARE NOT DIVIDED ON WHETHER, WHEN A MOTHER SEEKS TO ENFORCE A CHILD-SUPPORT ORDER *PRO SE*, A COURT MUST *SUA SPONTE* APPOINT COUNSEL BEFORE JAILING A NONPAYING FATHER FOR CIVIL CONTEMPT

Petitioner errs in claiming that twenty-two appellate decisions "direct[ly] conflict" with the decision below. Pet. 3, 12. The decisions he cites, *id.* at 12-19, are inapposite. Most involved criminal cases,

cases prosecuted by the State or by a plaintiff's lawyer, or cases not involving child support. Not one of the cited cases' holdings squarely conflicts with the decision below.

1. A majority of the cases relied upon in the petition involved proceedings prosecuted by the State. There is no indication that the courts that decided these cases would apply a similar rule in a civil dispute between two *pro se* parties, whose power and resources are roughly equal. Thus, the Supreme Court of Michigan noted the need to counterbalance the State's lawyer: "[S]ince the *state's* representative at such a hearing is well versed in the laws relating to child support, fundamental fairness requires that the indigent who faces incarceration should *also* have qualified representation." *Mead* v. *Batchlor*, 460 N.W.2d 493, 503 (Mich. 1990) (emphases added). The Supreme Court of Wisconsin similarly explained its ruling in terms of the imbalance of power between a State represented by counsel and an unrepresented defendant: "[W]here the state in the exercise of its police power brings its power to bear on an individual through the use of civil contempt as here and liberty is threatened, we hold that such a person is entitled to counsel." *Ferris* v. *State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977).

More than a dozen other decisions, including all but one of the circuit decisions, are likewise distinguishable because they involved

suits initiated by lawyers for the State. *See In re Di Bella*, 518 F.2d 955, 957, 959 (2d Cir. 1975) (also noting that alleged contemnor in fact had counsel, and issue was not appointment of counsel but exclusion of counsel from critical stage); *In re Kaigo*, 484 F.2d 1215, 1221 (4th Cir. 1973) (also dictum, because court found "no deprivation of due process or sixth amendment right to counsel," as alleged contemnor had counsel at the contempt hearing); *Ridgway v. Baker*, 720 F.2d 1409, 1411 (5th Cir. 1983) (brought by Texas Department of Human Resources at the prompting of Kansas); *Sevier v. Turner*, 742 F.2d 262, 265 (6th Cir. 1984) (brought by a judge, a referee, and an agent of the Tennessee Department of Human Resources, all of whose salaries were funded by fathers' purge payments); *United States v. Anderson*, 553 F.2d 1154, 1155 (8th Cir. 1977) (per curiam) (listing Assistant U.S. Attorney as counsel); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1368 (9th Cir. 1972) (per curiam) (same); *People v. Lucero*, 584 P.2d 1208, 1210, 1214 (Colo. 1978) (brought by District Attorney before grand jury, issue was exclusion of retained counsel rather than appointment of counsel, and any error was harmless); *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 166-68 (Del. 1996) (thrice framing its holding as limited to "*State initiated* contempt proceedings" and twice adding qualifier "civil" (emphasis added)); *McNabb v. Osmundson*, 315 N.W.2d 9, 10 (Iowa 1982) (en banc) (brought by

County Attorney); *Pasqua* v. *Council*, 892 A.2d 663, 666, 670 (N.J. 2006) (brought by Probation Division, listing Assistant Attorney General as counsel); *Tetro* v. *Tetro*, 544 P.2d 17, 19 (Wash. 1975) (brought by county prosecutor); *Bradford* v. *Bradford*, No. 86-282-II, 1986 WL 2874, at *1 (Tenn. Ct. App. Mar. 7, 1986) (brought by District Attorney General); *see also Andreas* v. *Walton*, 428 So.2d 663, 664-65 (Fla. 1983) (brought by Department of Health and Rehabilitative Services); *Colson* v. *State*, 498 A.2d 585, 585-86 (Me. 1985) (listing Assistant Attorney General as counsel); *Duval* v. *Duval*, 322 A.2d 1, 2 (N.H. 1974) (brought by Department of Probation); *State ex rel. Dep't of Hum. Servs.* v. *Rael*, 642 P.2d 1099, 1100-02 (N.M. 1982) (brought by Department of Human Services, listing Assistant Attorney General as counsel); *Krieger* v. *Commonwealth*, 567 S.E.2d 557, 559 (Va. Ct. App. 2002) (brought by attorney for Commonwealth).

2. As explained *infra* at 24-28, the civil/criminal distinction determines the Sixth Amendment right to counsel. One of the cases agreeing with the decision below distinguished contrary authority on this ground: "[W]e find a great factual difference" between "a criminal prosecution involving the inordinately unbalanced power of the state's prosecutorial forces and resources" and cases such as this one, where "the 'adverse' party, the mother of the children, was not represented by counsel." *In re Calhoun*, 350 N.E.2d 665, 666-67 (Ohio 1976) (per

curiam). Several of the cases cited above are additionally distinguishable because they involved proceedings that the court viewed as criminal or quasi-criminal. *See Ridgway*, 720 F.2d at 1413-14 & n.7 (noting that Texas law viewed the proceedings as criminal or quasi-criminal, that the State judge had labeled the proceedings "quasi criminal," and that the possible sanctions were punitive and not just remedial); *McNabb*, 315 N.W.2d at 11 (noting that Iowa law did not differentiate civil from criminal contempts, citing *Knox v. Mun. Ct.*, 185 N.W.2d 705, 707 (Iowa 1971)); *Colson*, 498 A.2d at 387-88 (incarceration grew out of nonpayment of previously imposed criminal fine); *Tetro*, 544 P.2d at 19 (treating contempt proceeding as "quasi-criminal" under Washington precedents); *see also Cnty. of Santa Clara v. Cnty. Super. Ct.*, 5 Cal. Rptr. 2d 7, 8, 13 (Cal. Ct. App. 1992) (under California law the proceeding was "criminal in nature").

3. In other cases, unrepresented defendants were unevenly matched against plaintiffs' lawyers, a factor some courts deemed significant. *Calhoun* suggested that "unbalanced power" could be present where "the 'adverse' party, the mother of the children," was "represented by counsel" while the father was not. *Calhoun*, 350 N.E.2d at 666-67. *See Walker v. McLain*, No. CIV-84-817-T, at 2 (W.D. Okla. May 23, 1984) (noting that alleged contemnor had to pay attorney's fee to plaintiff's attorney), *rev'd and remanded*, 768 F.2d

1181 (10th Cir. 1983); Br. of Appellant at 1, 1993 WL 13134396, at *1; *Sanders* v. *Shephard*, 541 N.E.2d 1150 (Ill. Ct. App. 1989), *aff'd*, 645 N.E.2d 900 (Ill. 1994); *Rutherford* v. *Rutherford*, 464 A.2d 228, 229, 231, 233-34 (Md. 1983) (alternative holding); *Peters-Riemers* v. *Riemers*, 663 N.W.2d 657, 660 (S.D. 2003); *see also* Br. of Appellant at 1-2; *Adkins* v. *Adkins*, 248 S.E.2d 646 (Ga. 1978) (referring to award of plaintiff's attorney's fees); *Rodriguez* v. *Eighth Judicial Dist. Court*, 102 P.3d 41, 43 (Nev. 2004).[3]

4. Many of the cases cited in the petition are inapposite because they do not involve contempts in child-support proceedings, which are relatively simple, but rather other types of cases with "legal issues of some complexity." *Rutherford*, 464 A.2d at 238 (Murphy, C.J., concurring in part and dissenting in part) (distinguishing civil contempts in child-support cases on this ground). *See, e.g.*, *Anderson*, 553 F.2d at 1155 (IRS summons); *In re Di Bella*, 518 F.2d at 956 (grand jury subpoena); *In re Kilgo*, 484 F.2d at 1217 (same); *In re Grand Jury Proceedings*, 468 F.2d at 1368 (same); *Lucero*, 584 P.2d at

[3] Most of the intermediate-state-court opinions cited by petitioner, *see* Pet. 17 n.9, are distinguishable on the same ground: the plaintiffs in those cases were represented by attorneys, creating what courts may have perceived as an imbalance of power. *See Emerick* v. *Emerick*, 502 A.2d 933, 933-34 (Conn. App. 1985), *cert. dismissed*, 510 A.2d 192 (Conn. 1986), *later proceeding* 613 A.2d 1351, 1353 (Conn. App. 1992), *cert. dismissed*, 617 A.2d 171 (Conn. 1992); *In re Marriage of Sharpe*, 569 N.E.2d 1117, 1118-19 (Ind. Ct. App. 1987); *Hunt* v. *Moreland*, 697 S.W.2d 328, 327 (Mo. Ct. App. 1985); *Ulah* v. *Salvatore Ulah*, 886 N.Y.S.2d 18, 19 (N.Y. App. Div. 2007); *Ex parte Walker*, 748 S.W.2d 21, 21 (Tex. App. 1988).

1210 (same); *Sanders*, 645 N.E.2d at 901 (failure to produce a minor child); *Allen v. Sheriff of Lancaster Cnty.*, 511 N.W.2d 123, 126-28 (Neb. 1994) (failure to pay debt owed to third party under dissolution decree) (alternative holding), *overruled on other grounds by Smeal Fire Apparatus Co. v. Kruckemeier*, 782 N.W.2d 848, 864 n.53, 867 (Neb. 2010); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 721, 725-26 (S.D. 2003) (per curiam) (corporate officers held in contempt for failing to produce financial records) (alternative holding), *abrogated by* Sazama v. *State ex rel. Mulenberg*, 729 N.W.2d 335, 343 (S.D. 2007); *Ferris*, 249 N.W.2d at 790 (failure to comply with environmental agency's order to clean up unlicensed solid-waste-disposal site); *see also Ne. Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 68-69 (3d Cir. 1991) (disobeying injunction in civil RICO case) (alternative holding); *Colson*, 498 A.2d at 586 (failure to pay criminal fine); *Krieger*, 367 S.E.2d at 539 (public nuisance action).

3. Petitioner cites several other cases that do not squarely address the issue here. Pet. 16-17. *Otton v. Zabonic* explicitly "base[d] its recognition of a right to counsel[] on the right to jury trial in a contempt proceeding for nonpayment of child support recognized in *Johansen v. State*, 491 P.2d 759 (Alaska 1971)." 525 P.2d 537, 538 (Alaska 1974). *Johansen*, however, grounded that right in State statutes and precedents, never mentioning the U.S. Constitution. 491 P.2d at 766. *Johansen*

seems only to have claimed that "he was denied the constitutional safeguards guaranteed to him by the Alaska Constitution." *Id.* at 761. Alaska has long interpreted its State constitutional right to counsel in civil cases more broadly than the U.S. Constitution requires. *See V.F. v. State*, 666 P.2d 42, 44-45 & nn.2, 3 (Alaska 1983) (expressly rejecting *Lassiter*, 452 U.S. at 31-32, in finding a right to counsel in the Alaska Constitution in proceedings to terminate parental rights).

In *Chouinere v. Brooks*, the defendant – unlike petitioner – had specifically requested court-appointed counsel. 660 A.2d 289, 289 (Vt. 1995) (mem.). More importantly, "*Chouinere* was a summary entry order," in which "the right-to-counsel issue was raised sua sponte by the Court and was neither briefed nor argued by the parties. Not surprisingly, the entry order contains no meaningful discussion or analysis of the issue." *Russell v. Armitage*, 697 A.2d 630, 639 (Vt. 1997) (Morse, J., concurring). The Vermont Supreme Court endorsed *Chouinere*'s position in *Russell*, but with an important qualification. *Russell* noted that the case was "more like a criminal proceeding" because the request for incarceration was made by an "attorney for the State." *Id.* at 634-35 & n.1 (majority opinion). And *Russell*'s right-to-counsel observation was dictum, as the court there affirmed the contempt order because Russell in fact had counsel at the hearing that resulted in his incarceration. *Id.* at 635-36.

Finally, petitioner cites the Ohio Supreme Court's decision in *In re Calhoun* as finding no right to counsel. 350 N.E.2d 665, Pet. 18. While *Calhoun* broadly supports the reasoning and decision below, it also rested on several alternative holdings: Calhoun had failed to sign and verify the petition and to specify the jailer as required by State statute, and his habeas suit was inappropriate because he had not shown the inadequacy of an appeal. 350 N.E.2d at 667.

6. The only decision cited in the petition that even possibly conflicts with the decision below is *McBride* v. *McBride*, 431 S.E.2d 14 (N.C. 1993). *McBride* does not indicate whether the mother who brought that case was represented by counsel at the contempt hearing, so it may not squarely conflict with the decision below. At most, petitioner has shown a conflict between the North Carolina and South Carolina Supreme Courts, involving decisions seventeen years apart. No federal court of appeals has yet resolved this precise issue. If this issue were important and recurring, one would expect to see more development in the lower courts. The dearth of decisions on the precise question presented militates against this Court's review.

II. A Number of Grave Vehicle Problems Would Likely Prevent This Court from Reaching and Resolving the Question Presented

This case suffers from multiple serious vehicle problems that would likely prevent this Court from resolving the question presented.

1. First, this suit is moot because petitioner has completed his twelve-month sentence, and it is unclear what relief petitioner seeks or how it would redress any past injury. It is thus no longer a case or controversy justiciable under Article III. Direct appeals are generally moot once a defendant completes his sentence, absent collateral consequences of the conviction. *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Petitioner has not alleged any such collateral consequences here.

In a similar case, the Seventh Circuit rejected on Article III grounds a nonsupporting father's challenge to his incarceration for contempt without appointed counsel. There, as here, the father had finished serving his sentence before the case reached the appeals court. Writing for the Seventh Circuit, Judge Posner noted that "it is highly uncertain that" "even though he is financially unable to comply, he will be prosecuted" again. *Mann* v. *Hendrian*, 871 F.2d 51, 53 (7th Cir. 1989). "So it is a matter of speculation whether he will again find himself prosecuted for contempt unless he deliberately violates the support order," and a nonsupporting father cannot establish Article III standing by announcing a plan "to flout the order." *Id.*

Even if petitioner could show that he was likely to face another contempt sanction without willfully violating the support order, he cannot show that the sanction would evade review. He and other fathers may move to stay the contempt sanction pending appellate

review, as some fathers (even acting *pro se*) have done. A proper vehicle would be such a case, or one in which the father remains imprisoned. Many of the cases cited earlier met those requirements.[6]

2. Second, petitioner never timely raised the right-to-counsel issue in the trial court, but only on appeal. Other defendants have timely raised that issue.[7] Moreover, neither petitioner nor his amici briefed below the alternative argument based on the *Mathews/Lassiter* due process balancing test, nor did the decision below discuss it. Pet. App. 3a, 11a-15a; Br. *Amici Curiae* ACLU et al. 1 (S.C. S. Ct.) (framing issue exclusively as defendant's "Sixth Amendment right to counsel"); Pet. 25 n.14 (raising issue for first time on certiorari in a footnote). Petitioner and his amici treated that test as inapplicable to any proceeding involving incarceration, which they argued should be governed by *Argersinger*'s categorical Sixth Amendment rule. Pet. App. 11a-12a. Petitioner has thus forfeited this alternative claim.

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[6] *See, e.g.*, *Black*, 686 A.2d at 167 (family court postponed ruling on contempt order pending appellate review); *Sanders*, 645 N.E.2d at 903 (father remained imprisoned at time of appeal); *McNabb*, 315 N.W.2d at 10 (volunteer counsel had court suspend sentence pending motion and certiorari); *Rutherford*, 464 A.2d at 232 n.3 (circuit court stayed enforcement of contempt order pending appeal); *McBride*, 431 S.E.2d at 15 (defendant released pending appeal); *Peters Farmers*, 683 N.W.2d at 682 (trial judge stayed jail sentence pending appeal); *Wold Family Farms*, 681 N.W.2d at 722 (appellate court granted *pro se* motion staying contempt order pending appeal); *Colson*, 488 A.2d at 586 (court stayed commitment order pending appeal); *In re Calhoun*, 350 N.E.2d at 687 (declining to find case moot because appellant had been released on his own recognizance pending appeal and was thus still under restraint); *Rodriguez*, 102 F.3d at 45 (contempt order stayed and defendant released pending review); *Duval*, 322 A.2d at 2 (contempt order stayed pending appeal).

[7] Multiple fathers appearing *pro se* have requested counsel. *See, e.g.*, *Sanders*, 541 N.E.2d at 1153; *Chauncey*, 683 A.2d at 289; *Kiel*, 642 F.2d at 1101; *Cnty. of Santa Clara*, 5 Cal. Rptr. 2d at 8.

3. There is no reason to believe that the assistance of counsel would have affected the outcome here. In response to previous orders to show cause, petitioner or someone on his behalf had paid his arrears. He had more than twenty-one months to comply with this support order, but between April 2006 and January 2008 made no payments apart from $200 in the month immediately after the arrest warrant. Family-court records reflect, and petitioner admits, that he held a succession of jobs, several of which ended shortly after wage withholding began.[6] Most importantly, petitioner himself admitted that he failed to pay because he had indulged in illegal drugs, blamed only two of the twenty-one-plus months' nonsupport on disability, and admitted that "I know I done wrong." Pet. 17a. Petitioner now speculates about a host of legal defenses for which a lawyer's help might have been useful, Pet. 26-27 & n.17, but offers no evidence that any of them would have applied in his case.

4. Finally, one of petitioner's arguments actually threatens to take this case well outside the question presented, which is limited to "a civil contempt proceeding." Pet. i. Despite that framing of the question presented, petitioner later questions whether his proceeding was in fact a civil contempt, characterizing it as "wholly punitive" and

[6] *Cf. supra* at 4 n.1 (noting that many nonsupporting fathers develop "Acquired Income Deficiency Syndrome," changing or quitting jobs or hiding income to avoid garnishment).

thus criminal. Pet. 29 n.20. This equivocation about how to characterize the proceeding raises the danger that this Court will not even be able to decide the question presented and might have to dismiss the writ of certiorari as improvidently granted.

III. The Decision Below Is Correct

A. The Sixth Amendment Right to Counsel Is Limited to "Criminal Prosecutions," in Which Defendants Face Prosecutors' State Power as Well as Criminal Stigma

The Sixth Amendment right to counsel applies only to "criminal prosecutions" where defendants face not only loss of liberty but also (1) criminal-justice professionals wielding the enormous power of the State, and (2) the stigma of a criminal conviction. Neither condition applies here, because civil-contempt proceedings are not criminal prosecutions.

1. *No Imbalance of Prosecutorial Power.* The text of the Sixth Amendment limits its protections to "all criminal prosecutions." U.S. Const. amend. VI. Criminal defendants need appointed defense lawyers to balance the scales since "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime [and to hire] [l]awyers to prosecute" them. *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). Thus, this Court has consistently limited the Sixth Amendment right to counsel to criminal cases, where defendants must face State prosecutors. *See, e.g.*, *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 (1972) (understanding *Gideon*

and *Powell* v. *Alabama*, 287 U.S. 45 (1983), as relevant to "any criminal trial" and "all such criminal prosecutions"); *Scott* v. *Illinois*, 440 U.S. 367, 372-73 (1979) (reading *Argersinger* as drawing the outer boundary of "the constitutional right to appointed counsel in state criminal proceedings"); *Alabama* v. *Shelton*, 535 U.S. 654, 657 (2002) (reading *Argersinger* and *Scott* as limited to "any criminal prosecution . . . for the charged crime" (internal quotation marks omitted)).

Petitioner errs in quoting *Johnson* v. *Zerbst* for "'the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.'" Pet. 21 (quoting 304 U.S. 458, 4[62-]63 (1938)). The original quotation was not so truncated, but continued: ", wherein the prosecution is presented by experienced and learned counsel." 304 U.S. at 463; *see also id.* (limiting holding to "criminal proceedings"). Here, petitioner faced no criminal "prosecution" nor any "experienced and learned counsel," but only a *pro se* mother and the straightforward, indisputable factual issue of whether he paid, or could have paid, the sums certain of his child-support obligation.

Loss of liberty is a necessary but not sufficient condition to trigger a Sixth Amendment right to counsel. Where defendants are not outmatched by adversarial professional prosecutors, they do not need defense lawyers to balance the scales. Even though probation-

revocation hearings often trigger additional months or years in prison for convicted criminal defendants, they are not adversarial and do not automatically require defense counsel. *Gagnon*, 411 U.S. at 787, 790. Those proceedings are brought not by adversarial prosecutors but by probation officers, without formal procedures or rules of evidence. *Id.* at 788-89. Introducing defense counsel would trigger an arms race, requiring the State to bring in counsel on the other side and encumbering simple hearings with adversarial procedures. *Id.* at 787-88. So too here.

This Court reiterated these points when it rejected a Sixth Amendment or due process right to counsel for military courts-martial in *Middendorf* v. *Henry*, 425 U.S. 25, 34 (1976). *Middendorf* explicitly rejected the bright-line rule advanced by petitioner, which would require counsel before depriving any defendant of liberty: "A summary court-martial may impose 30 days' confinement at hard labor, which is doubtless the military equivalent of imprisonment. Yet the fact that the outcome of a proceeding may result in loss of liberty does not by itself, even in civilian life, mean that the Sixth Amendment's guarantee of counsel is applicable." *Id.* at 34-35; *accord id.* at 37. Summary courts-martial are not adversarial proceedings and involve no opposing lawyers. There is no prosecutor, but instead a "presiding officer acts as judge, factfinder, prosecutor, and defense counsel." *Id.* at 32. Requiring defense lawyers would necessitate prosecutors, complicating

an otherwise simple and nontechnical proceeding *Id.* at 43. Neither the Sixth Amendment nor due process requires defense counsel because there is no prosecutorial imbalance of power to rectify.

2. *No Criminal Stigma at Stake.* Moreover, the Sixth Amendment right to counsel applies only where a defendant faces the stigma that accompanies the State's criminal prosecution. Petitioner faces no such stigma here.

This Court has repeatedly emphasized criminal stigma as a key consideration triggering criminal procedure protections. *Apprendi* v. *New Jersey* extended the Sixth Amendment right to jury trial to sentence enhancements because "both the loss of liberty and the stigma attaching to the offense are heightened." 530 U.S. 466, 484 (2000). *In re Winship* required proof beyond a reasonable doubt because a juvenile-delinquency conviction imposes *both* "the stigma of a finding that he violated a criminal law and . . . the possibility of institutional confinement." 397 U.S. 358, 367 (1970). In *In re Gault*, a factor calling for appointed counsel was that the label "juvenile 'delinquent' . . . has come to involve only slightly less stigma than the term 'criminal' applied to adults." 387 U.S. 1, 23-24 (1967).

Conversely, loss of liberty by itself, without additional stigma, is insufficient to trigger the right to counsel. Probation-revocation hearings often deprive convicted criminal defendants of their liberty

for months or years but impose no additional stigma. *Cf. Gagnon*. That theme surfaced explicitly in *Muhlendorf*. Though the offense charged in *Muhlendorf* was punishable with loss of liberty, it "carrie[d] little popular opprobrium" and no "stamp of 'bad character' with conviction." 425 U.S. at 39. Thus, neither the Sixth Amendment nor due process guaranteed a right to appointed counsel.

A civil-contempt sanction carries far less stigma than a criminal conviction; it neither labels defendants as felons nor shames them with rap sheets. Nor do civil contemnors have to list their civil-contempt convictions on job applications or register as offenders. *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (recognizing these as important kinds of stigma imposed by criminal convictions). Thus, the Sixth Amendment's protection against criminal stigma does not apply.

3. *Civil Contempt Proceedings Are Not Criminal Prosecutions.* "Criminal contempt proceedings, *unlike civil proceedings*, could require such protections as the Sixth Amendment right to counsel." 27 James Wm. Moore et al., *Moore's Federal Practice* § 642.03[1], at 642-14 (3d ed. 2010) (emphasis added). Contempt sanctions to enforce child-support orders are civil because the sanction is conditional, designed to make the plaintiff whole by forcing the defendant to pay what he owes. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the

sentence is punitive, to vindicate the authority of the court." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). "The paradigmatic coercive, civil contempt sanction" is jailing a defendant for refusing to pay alimony "until he complies." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) (citing *Gompers*, 221 U.S. at 442); *see also Chadwick v. Janecka*, 312 F.3d 597, 607-08 (3d Cir. 2002) (Alito, J.) (holding that imprisoned contemnor in alimony case had no right to criminal procedures). Refusal to pay alimony is indistinguishable from petitioner's refusal to pay child support.

Though petitioner questions the relevance of the conditional sentence, *Gompers* treats the purge clause as dispositive. "If imprisoned, . . . he carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers*, 221 U.S. at 442 (citation omitted). "If the relief imposed here is in fact a determinate sentence with a purge clause, then it is civil in nature" and does not require criminal procedures. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 640 (1988) (child support case); *see also Shillitani v. United States*, 384 U.S. 364, 370 & n.6 (1966) (upholding as civil a two-year sentence including a purge clause); *Bagwell*, 512 U.S. at 828. That is exactly

the case here.[1] Petitioner's arguments to the contrary offer little reason to sweep away a century of workable, settled contempt law.

Finally, blurring the civil/criminal distinction would ensnare this Court in endless line drawing difficulties. Extending the right to counsel invites interminable litigation about extending other criminal procedures to civil cases, including the rights to jury trial, a speedy and public trial, the privilege against self incrimination, confrontation, cross-examination, and proof beyond a reasonable doubt. This Court briefly experimented with extending the double jeopardy guarantee beyond criminal to certain civil penalties. *United States* v. *Halper*, 490 U.S. 435, 448-49 (1989). In doing so, *Halper* chose to disregard the civil/criminal divide, just as petitioner advocates here. *Id.* at 447. Just eight years later, this Court abrogated *Halper* and once again limited double jeopardy to criminal prosecutions. *Hudson* v. *United States*, 522 U.S. 93, 96 (1997). *Halper*'s line-drawing effort to denominate some civil penalties as punitive had quickly proven "unworkable." *Id.* at 102. *Halper*'s mistake cautions against repeating the error here. The civil/criminal distinction determines whether criminal procedures apply.

[1] The contempt is civil so long as the defendant is allowed to avoid the sanction by proving his inability to comply. In civil cases, defendants may bear the burden of proving their inability to pay. *Hicks*, 485 U.S. at 637-38; *United States* v. *Rylander*, 460 U.S. 752, 757 (1983). Petitioner was given ample opportunity to prove his inability to comply, but frankly conceded that he could have complied but instead indulged in illegal drugs. Pet. App. 17a. Further, the court gave petitioner work-release privileges, but there is no evidence in the record that he exercised them to purge his child support obligation. There is little doubt that "he carrie[d] the keys of his prison in his own pocket." *Gompers*, 221 U.S. at 442 (citation omitted).

B. Due Process Does Not Require the Appointment of Counsel in *Pro Se* Proceedings to Enforce Child Support

1. Petitioner claims that the Due Process Clause creates a right to counsel far broader than that imposed by the Sixth Amendment. But the Due Process Clause of the Fourteenth Amendment simply incorporates the Sixth Amendment right to counsel, making it apply to State criminal prosecutions exactly as it does to federal ones. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034-36 & n.12 (2010) (interpreting *Gideon*, 372 U.S. at 341, 343). The scope and content of the right are unchanged.

2. Petitioner cites only one case that arguably recognized a categorical right to counsel outside a traditional criminal prosecution. *In re Gault*, which involved a juvenile delinquency proceeding. Pet. 22. In *Gault*, police arrested a fifteen-year-old, brought him before a judge, filed a formal charging instrument and affidavit, and testified against him. The court sentenced the teenager to six years' confinement, even though an adult convicted of the same offense would have faced a maximum of two months' incarceration. 387 U.S. at 19. Thus *Gault* considered the prosecution by a professional police officer "comparable in seriousness to a felony prosecution." *Id.* at 36.

Though the majority opinion in *Gault* relied on due process, *id.* at 41, Justice Black's concurrence recognized that due process mattered because it incorporated wholesale the criminal procedures

required by the Fifth and Sixth Amendments. *Id.* at 61 (Black, J., concurring). Chief Justice Burger likewise read both *Winship* and the earlier *Gault* decision as holding that "all juvenile proceedings are 'criminal prosecutions'" within the meaning of the Sixth Amendment. *In re Winship*, 397 U.S. 358, 375-76 (1970) (Burger, C.J., dissenting). *See also id.* at 365-66 (majority op.) (reading *Gault* as equating delinquency adjudication with criminal prosecution because the proceedings are "comparable in seriousness to a felony prosecution" and thus "need . . . criminal due process safeguards" (quoting *Gault*, 387 U.S. at 36)); *Gagnon v. Scarpelli*, 411 U.S. 778, 789 n.12 (1973) (reading *Gault* as holding that the right to appointed counsel applied because the juvenile-delinquency proceeding, "while denominated civil, was functionally akin to a criminal trial"). Thus, *Gault*'s right-to-counsel holding is better understood as resting on the Sixth Amendment.

Even if *Gault* creates a categorical due process right to counsel beyond the Sixth Amendment, it is limited to those proceedings that are criminal in all but name. *Gault* involved (a) a prosecution brought by an experienced criminal-justice professional against an unrepresented minor; (b) an unconditional sentence of six years' confinement; and (c) "only slightly less stigma" than a criminal conviction. 387 U.S. at 4-9, 23-24, 36. All three factors combined made the juvenile-delinquency proceedings "comparable in seriousness to a

felony prosecution," 387 U.S. at 36, and thus required appointed counsel. Not one of those factors is present here.[*]

3. In an effort to expand the right to counsel beyond criminal prosecutions, petitioner relies heavily on *Lassiter*'s supposed "determination ... that the right to counsel applies in any proceeding, civil or criminal, that could lead to incarceration." Pet. 22 (characterizing *Lassiter*, 452 U.S. 18). That is not, however, *Lassiter*'s holding. Cf. *Middendorf*, 425 U.S. at 34-35, 37 (explicitly rejecting this proposed rule). *Lassiter* held that a parent has no right to appointed counsel in a proceeding to terminate her parental rights. The Court stated that loss of liberty is a necessary condition for claiming a right to counsel. 452 U.S. at 25 ("*only where* the litigant may lose his physical liberty"); *id.* at 26-27 ("*only when*, if he loses, he may be deprived of his physical liberty") (emphases added). But *Lassiter* did not itself involve a threat of imprisonment, and this Court had no occasion to – and did not – hold or suggest that it is a *sufficient* condition. As explained *supra* at 24-28, a defendant must also show at least that he faces the

[*] Petitioner cites *Vitek v. Jones* as recognizing a *per se* right to counsel outside a traditional criminal prosecution. 445 U.S. 480, 497 (1980) (plurality opinion). That decision, however, has little precedential value. Only a plurality of the Court would have recognized a *per se* right to counsel. In his controlling concurrence, Justice Powell explicitly rejected the proposed *per se* right to counsel. He would have allowed the representation of a licensed psychiatrist or even perhaps a layman, rather than an attorney, to satisfy the convicted felon's rights in a hearing concerning his transfer to a mental institution. *Id.* at 497, 498 (Powell, J., concurring in part and concurring in the judgment). He particularly stressed "the capability of the inmate," *id.* at 498, who by the very nature of the issue will often be of unsound mind.

prosecutorial power of the State, an imbalance of power, and the stigma of a criminal conviction. Not one of these prerequisites is present here.

2. Except in the rare case that is criminal in all but name, as in *Gault*, due process does not require a categorical right to counsel. As an initial matter, judges' longstanding power to jail for civil contempt without appointing counsel underscores the lack of any unwritten due process right to counsel. *See Burnham* v. *Superior Ct. of Cal.*, 495 U.S. 604, 619 (1990) (plurality opinion) (noting that a "process of law . . . sanction[ed by] settled usage both in England and in this country" necessarily amounts to due process) (internal quotation marks omitted).

Even if this Court were to revisit the constitutionality of this power, there is no need and no place for petitioner's proposed categorical rule. At best, petitioner would have to satisfy the three-factor balancing test of *Mathews* and *Lassiter* to establish whether counsel is necessary in the particular circumstances at hand. Courts must balance "[a] the private interests at stake, [b] the government's interest, and [c] the risk that the procedures used will lead to erroneous decisions." *Id.* at 27.[3] Balancing these three factors, courts have properly found that they do not support a right to counsel in

[3] *Cf. Medina* v. *California*, 505 U.S. 437, 445-46 (1992) (explaining that where a criminal procedure is "grounded in centuries of common-law tradition," courts should determine whether the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (internal quotation marks omitted).

child support civil-contempt cases. *See Rodriguez*, 102 P.3d at 30-31; *Kael*, 642 P.2d at 1102-03.

3. As mentioned, petitioner has forfeited this fundamental-fairness claim by failing to raise it below. *Sigmi* at 22. Assuming *arguendo* that the issue survives his forfeiture, several points relevant to this balancing test merit special consideration. First, the government has an interest in keeping *pro se* fathers evenly matched with *pro se* mothers seeking to enforce child support orders, instead of disadvantaging the latter or having to hire lawyers for both sides.

The government also has a strong interest in conserving scarce indigent-defense dollars for "criminal prosecution[s]" where the Sixth Amendment expressly guarantees counsel. Indigent criminal defense is chronically overburdened and strapped for cash. Criminal "defense services in the U.S. are not adequately funded, leading to all kinds of problems. These include a lack of funds to attract and compensate defense attorneys, pay for experts, investigative and other support services, cover the cost of training counsel, and reduce excessive caseloads." Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* iv (2004). Imposing a civil *Gideon* requirement on public defenders and other appointed lawyers, on top of the existing strain of criminal cases, would make this already-terrible situation worse.

Governments are entitled to engage in triage, reserving free lawyers for those cases expressly included within the Sixth Amendment's criminal scope.

The private interests of civil contemnors are substantially weaker than those of criminal defendants, to whom the Sixth Amendment guarantees appointed attorneys. Civil contemnors face no State prosecutors or criminal stigma, often (as here) have sentences capped at one year, and often (as here) can free themselves by participating in work release. Criminal defendants need lawyers most.

To the extent that a delinquent father has any defense to a contempt order, it would typically involve the straightforward factual issues of whether there was nonpayment (often conceded) and whether the defendant had the ability to pay (indigence). Determining indigence is rarely complex, and such determinations ordinarily are and must be made without counsel. A defendant has no right to appointed counsel until he first shows his indigence. *See, e.g.*, 18 U.S.C. § 3006A(b) (2006); Cal. Gov't Code § 27707 (2008); Fla. Stat. § 27.52 (2010); Minn. Stat. § 611.17 (2010); S.C. Code Ann. § 17-3-30 (2009); *State* v. *Hudson*, 228 A.2d 132, 135 (Conn. 1967); *Schmidt* v. *Uhlenhopp*, 140 N.W.2d 118, 121 (Iowa 1966); *State* v. *Dean*, 471 N.W.2d 310, 314-15 (Wis. Ct. App. 1991) (defendant must first prove indigence by a preponderance of the evidence). Indigence, in other

words, is not a determination that itself requires counsel; it is a simple factual prerequisite to appointing counsel. A lawyer is no more needed in child-support cases than in appointment-of-counsel proceedings. Holding otherwise would greatly impede appointment of counsel, as every defendant would first have to receive an appointed lawyer to figure out whether the defendant was entitled to an appointed lawyer.[10]

4. The merits of this case, however, simply are not presented for this Court's review. As explained above, review of the merits would be fatally hampered by (a) serious mootness concerns; (b) petitioner's failure to raise the due process balancing claim in any State court; (c) the lack of any showing that counsel would have affected the outcome; and (d) petitioner's questioning whether this contempt proceeding was civil. Too many obstacles obstruct this Court's ability to reach and resolve the question presented.

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[10] Even though amici offer tendentious research done during the pendency of and for purpose of this litigation, their evidence confirms that there is little need for lawyers because courts are carefully evaluating the merits. In a majority of cases (54%), judges decline to find the nonsupporting father in contempt. Br. *Amici Curiae* Ctr. for Fam. Pol'y & Practice et al. (CFFP Br.) 17. 80% of those held in contempt alleged no disability or injury limiting their ability to work. *Id.* at 18. Many failed to pay support because they were drug users. *Id.* Others hid their income, earning money from criminal or other "underground" sources. *Id.* at 20; NACDL Br. 16. Petitioner and his amici cannot infer from the raw fact of nonpayment and contempt that many parents are being *erroneously* held in contempt and confined. Pet. 31-32; NACDL Br. 13-14; Constitution Project Br. 22; *see also* CFFP Br. 18-19 (faulting judges for carefully questioning and "looking for some minor flaw in the obligor's story"). On the contrary, judges appear to be carefully sifting fathers who cannot pay from fathers who choose not to pay, instead of rubber-stamping findings of contempt.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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September 24, 2010

OPPOSITION BRIEF

No. 10-10

In The
Supreme Court of the United States

MICHAEL D. TURNER

Petitioner

v.

REBECCA PRICE,

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION OF SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES

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PARTIES TO PROCEEDING

The caption contains the parties to the proceeding below but attempts to add, as a new party, the South Carolina Department of Social Services (DSS). DSS is an agency that was not a party to the proceeding below. It is not listed as a party in any of the Orders or Opinion in the Appendix except for an Order of Financial Responsibility as to Petitioner (Pet. App. 19a). The Financial Responsibility Order imposed the requirement that Petitioner pay child support, and his child support arrearage was the basis of the Order for Contempt (Pet. App. 6a), but the Financial Responsibility Order is not the subject of this Petition for Certiorari. (Pet. 1)

ARGUMENT

THE DEPARTMENT OF SOCIAL SERVICES IS NOT A PARTY TO THIS CASE

The Department of Social Services is not a party to this case because it was not a party to the appeal in the South Carolina Supreme Court. App. 1a. Only Petitioner Turner and Respondent Price were parties to the State Supreme Court proceeding. DSS was not a party to the Family Court Order from which the appeal was taken to the South Carolina Supreme Court. Pet. App. 6a. Respondent was brought to Court pursuant to the Court's own directive, a Bench Warrant, and not at the initiative of DSS. Pet. App. 6a.

Rule 12.6, Rules of the Supreme Court of the United States, makes clear that the parties to a Petition for Certiorari are the parties to the proceeding below. This Rule states that "all parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court . . . All parties other than the petitioner are considered Respondents . . ." See also 28 USC § 1257 (Review of judgments of highest court of a State). DSS was not a party to the proceeding in the South Carolina Supreme Court the judgment of which is the subject of this Petition. DSS does not seek to intervene now. Therefore, DSS is not a party to this Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied as to DSS or DSS should be removed as a party to this matter.

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September 24, 2010

MOTION

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No. 10-10

IN THE
Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS [AND LARRY E. PRICE, SR.]
Respondent[s]

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO INTERVENE AS RESPONDENT BY LARRY E. PRICE, SR.

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SUPREME COURT, U.S.

Larry F. Price Sr. respectfully moves for leave to intervene in this matter as a respondent aligned with respondent Rebecca L. Rogers (nee Price). Intervention should be permitted for the following reasons.

1. Respondent Rebecca L. Rogers is the mother of B.L.P., the minor in this child support action. Mrs. Rogers is the plaintiff who sought to enforce the child support order against petitioner Michael D. Turner. While this case was pending below, Rogers became indigent and had to relinquish physical custody of B.L.P. to her parents, Judy and Larry F. Price, Sr. Accordingly, in May 2009, the Oconee County Family Court redirected future child support payments from Rebecca Rogers to Judy Price. Judy Price passed away in June 2010, so her widower, proposed respondent Larry F. Price, Sr., now has sole physical custody of his granddaughter, B.L.P. Because the family court has ordered petitioner to direct future child support payments to Mr. Price, he now has a financial interest in the outcome of this litigation.

Mr. Price's intervention would not change the factual or legal posture of the case. His own indigence and inability to hire a lawyer are consistent with his daughter's, and will not change this Court's consideration of whether due process or the Sixth Amendment requires appointing counsel for petitioner. As argued in respondent[s]' brief in opposition to certiorari, there is a strong governmental interest in

keeping a level playing field, so that indigent child support plaintiffs who cannot hire counsel are not disadvantaged relative to defendants in child support proceedings.

2. Allowing Mr. Price's intervention will not prejudice petitioner or delay the proceedings. The undersigned counsel represent both Mrs. Rogers and her father, Mr. Price. If certiorari is granted, both parties agree that they will not submit separate briefs or split oral argument time.

CONCLUSION

Mr. Price respectfully requests that this Court grant his motion for leave to intervene.

Respectfully submitted,

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September 24, 2010

No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner

v.

REBECCA L. ROGERS [AND LARRY E. PRICE, SR.],

Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

CERTIFICATE OF SERVICE

I, Stephanos Bibas, hereby certify that on September 24, 2010, I served the Brief in Opposition, the accompanying Motions for Leave to Proceed In Forma Pauperis and supporting Affidavits of Rebecca L. Rogers and Larry E. Price, Sr., and the Motion to Intervene as Respondent by Larry E. Price, Sr. in the above-entitled case on counsel for respondent by causing three true copies to be delivered by overnight mail to the following:

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Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of September, 2010, at Philadelphia, PA.

Stephanos Bibas

REPLY BRIEF

172

(5)

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No. 10-10

IN THE

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REBECCA PRICE AND
SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. CONFLICT AMONG THE COURTS WARRANTS REVIEW 2

II. NO VEHICLE PROBLEMS PRECLUDE REVIEW 5

A. The Case Is Not Moot 5

B. Turner Did Not Waive His Claim 6

C. There Are No Other Vehicle Problems 7

III. THE DECISION BELOW IS ERRONEOUS 8

A. A Defendant Facing Incarceration Is Entitled To Appointed Counsel 8

B. Respondents' Remaining Arguments Do Not Support The Judgment Below 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Shelton*, 535 U.S. 654 (2002) 8, 9, 11

Cohen v. *Cowles Media Co.*, 501 U.S. 663 (1991) 6

Federal Election Commission v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 5

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 9

In re Gault, 387 U.S. 1 (1967) 8

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 6

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981) 8, 11

Lebron v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995) 7

Leonard v. *Hammond*, 804 F.2d 838 (4th Cir. 1986) 6

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 7

McNabb v. *Osmundson*, 315 N.W.2d 9 (Iowa 1982) 3

Middendorf v. *Henry*, 425 U.S. 25 (1976) 9

Miranda v. *Arizona*, 384 U.S. 436 (1966) 6

Otton v. *Zaborac*, 525 P.2d 537 (Alaska 1974) 4

Pasqua v. *Council*, 892 A.2d 663 (N.J. 2006) 4

People v. *Lucero*, 584 P.2d 1208 (Colo. 1978) 4

Powell v. *Alabama*, 287 U.S. 45 (1932) 6

Ridgway v. *Baker*, 720 F.2d 1409 (5th Cir. 1983) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Rodriguez v. *District Court*, 102 P.3d 41 (Nev. 2004) 2

Russell v. *Armitage*, 697 A.2d 630 (Vt. 1997) 4

Sevier v. *Turner*, 742 F.2d 262 (6th Cir. 1984) 3

Tetro v. *Tetro*, 544 P.2d 17 (Wash. 1975) 3

United States v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) 3

Walker v. *McLain*, 768 F.2d 1181 (10th Cir. 1985) 4, 6, 7

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 7

STATUTES AND RULES

18 U.S.C. § 3006A(b) 12

S.C. Code Ann.
§ 24-13-910 12
§ 24-13-930 12

S.C. Fam. Ct. R. 24 3

OTHER AUTHORITIES

http://www.state.sc.us/dss/csed/delinq.htm (last visited Oct. 4, 2010) 11

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No. 10-10

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In holding that indigent defendants have no constitutional right to appointment of counsel before being incarcerated for civil contempt, the Supreme Court of South Carolina acknowledged that its decision was contrary to the weight of authority. Pet. App. 3a–4a n.2. Indeed, the decision conflicts with twenty-two decisions of other federal and state courts. Pet. 12-19. This Court's review is warranted to resolve that conflict and reaffirm that the Constitution requires appointment of counsel in any proceeding, civil or criminal, that results in incarceration.

Respondents offer no valid reason why this Court should deny certiorari. Their efforts to minimize the

conflict among the courts are demonstrably unavailing. None of the alleged vehicle problems respondents cite poses any obstacle to this Court's review: the state supreme court squarely passed upon the federal right-to-counsel question, and Turner's case epitomizes the mootness exception for issues that are capable of repetition, yet evade review. Respondents' defense on the merits similarly falls short.

Moreover, though respondents cast unwarranted aspersions on Mr. Turner, they do not deny the importance of the issues at stake. As amici have shown, indigent non-custodial parents are routinely incarcerated in modern-day debtors' prisons in South Carolina and a handful of other States because they cannot pay court-ordered child support and lack the assistance of appointed counsel to present that defense. The Court should grant certiorari to bring those States in line with the Constitution's requirements.

I. Conflict Among The Courts Warrants Review

Twenty-two federal and state courts have ruled—contrary to the decision below—that the right to counsel applies in civil contempt proceedings leading to incarceration. Pet. 12-19; Pet. App. 3a-4a n.2; *see also, e.g.*, *Rodriguez* v. *District Court*, 102 P.3d 41, 48 (Nev. 2004) (recognizing split). Respondents' efforts to minimize this entrenched conflict are unpersuasive.

1. Respondents contend (Opp. 13) that most of those cases are distinguishable because they "involved proceedings prosecuted by the State." That is doubly wrong.

First, none of those courts rested its conclusion on the presence or degree of state involvement. The decisions turned on whether a proceeding could result in

incarceration. As the Fifth Circuit explained, the right to counsel "extends to every case in which the litigant may be deprived of his personal liberty if he loses." *Ridgway* v. *Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983); *see also* Pet. 12-14, 16-18.

Second, this case *does* involve the State. Rebecca Price assigned her right to collect child support to the State, and the State continues to enforce the child-support order through automated procedures administered by the family court. Pet. 6-9 & n.2; S.C. Fam. Ct. R. 24. When a child-support obligor has fallen more than five days in arrears, the clerk of the family court must *sua sponte* issue a rule to show cause why the obligor should not be held in contempt. Pet. 5. As occurred here, the court may issue a bench warrant for the obligor's arrest. At the contempt hearing, the clerk's affidavit establishes the defendant's arrearage. *Id.* Thus, it was the State's action that set in motion Turner's contempt proceeding and incarceration. *Id.* at 8-9.

2. Respondents seek (Opp. 16) to distinguish many of the cases recognizing a right to counsel because they purportedly "involved proceedings that the court viewed as criminal or quasi-criminal." In fact, there is broad consensus among those courts that a proceeding resulting in imprisonment implicates the right to counsel whether criminal *or* civil. *See, e.g.*, *Sevier* v. *Turner*, 742 F.2d 262, 266-267 (6th Cir. 1984); *United States* v. *Anderson*, 553 F.2d 1154, 1155-1156 (8th Cir. 1977); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982); *Tetro* v. *Tetro*, 544 P.2d 17, 19-20 (Wash. 1975) (en banc).

3. Respondents attempt (Opp. 17) to distinguish the cases cited in the petition for the further reason

that many involved contempt charges raising "'legal issues of some complexity,'" rather than "child-support proceedings, which are relatively simple." But those decisions rested on the prospect of incarceration, not the complexity of the proceeding. *See, e.g.*, *Walker* v. *McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985); *People* v. *Lucero*, 584 P.2d 1208, 1214 (Colo. 1978).

Moreover, establishing one's inability to pay child support is far from simple for an unrepresented defendant. It is certainly no less complex than cases involving failure to pay a debt, produce financial records, or pay a criminal fine. *Cf.* Opp. 17-18. To meet the burden of proof, the defendant must present competent evidence and argue the weight and import of that evidence under the law. Pet. 26-27. As other courts have recognized, doing so may be an "insuperable undertaking[]" for "the uninitiated layperson." *Pasqua* v. *Council*, 892 A.2d 663, 673 (N.J. 2006).

4. Respondents' remaining arguments similarly fail. *Otton* v. *Zaborac*—which acknowledged a right to counsel in civil contempt proceedings—relied on state *and* federal law. *See* 525 P.2d 537, 538, 539 (Alaska 1974); *cf.* Opp. 18-19. Similarly, the Vermont Supreme Court recognized the "rule" of "requiring assignment of counsel for indigent defendants in civil contempt proceedings that result in incarceration" and "held" that the Constitution "requires the appointment of counsel in a civil contempt proceeding in which an indigent defendant faces actual imprisonment." *Russell* v. *Armitage*, 697 A.2d 630, 633-634 (Vt. 1997); *cf.* Opp. 19. Finally, none of the cases cited by respondents justifies their bare speculation (Opp. 16-17 & n.3) that some courts recognized a right to counsel only because "unrepresented defendants were unevenly matched against plaintiffs' lawyers."

II. No Vehicle Problems Preclude Review

A. The Case Is Not Moot

Although Turner has completed the jail term under review, he remains indigent and faces a substantial risk of again being incarcerated without the assistance of appointed counsel. Indeed, he has been re-incarcerated since his release.

Proceedings against Turner for nonpayment of child support fit comfortably within the "capable of repetition, yet evading review" exception to mootness. Pet. 30 n.21. That exception applies where "'(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Both criteria are satisfied here.

Family court rules requiring *automatic* issuance of a rule to show cause whenever a child-support obligor's account falls more than five days in arrears have triggered contempt proceedings against Turner several times—both before and after the contempt order under review. Pet. 6-10, 30 n.21. These procedures create far more than a "reasonable expectation" that Turner will again be jailed without counsel in future contempt proceedings. Indeed, without a lawyer's assistance, that prospect is virtually certain: Turner remains indigent, and his arrearage far exceeds any income he is likely to earn in the near future.

Moreover, these proceedings are prone to escape appellate review because civil contemnors in South Carolina cannot be incarcerated on any single contempt

order for more than twelve months and are often sentenced for shorter periods. It is thus virtually impossible for a contemnor to litigate the validity of a contempt order prior to release. Indeed, here, Turner had completed his sentence and had been re-incarcerated and released on a subsequent contempt order before the Supreme Court of South Carolina ruled on his appeal. Pet. 30 n.21; *see also Walker*, 768 F.2d at 1182-1183; *Leonard* v. *Hammond*, 804 F.2d 838, 842-843 (4th Cir. 1986).

Respondents contend (Opp. 21) that Turner could obtain review of a contempt sanction in a future case by asking the court to stay the contempt sentence pending appeal. Respondents cite no precedent—and there is none—to support the proposition that a claim does not "evade review" for mootness purposes merely because a court *might* exercise its discretion to stay its order if asked to do so in a future case.

B. Turner Did Not Waive His Claim

The Supreme Court of South Carolina squarely addressed Turner's right-to-counsel claim under the Sixth and Fourteenth Amendments. Pet. App. 2a-5a. That is sufficient for this Court's review. *See, e.g., Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided.").

Moreover, a defendant does not forfeit his right to counsel by failing to ask for a lawyer. Rather, where the right applies, "it is the duty of the court, whether requested or not, to assign counsel for [an indigent defendant]." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932); *see Miranda* v. *Arizona*, 384 U.S. 436, 473 n.43 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938).

Nor is Turner's reliance on *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976), waived.[1] Turner argued on appeal in the state court that he was entitled to counsel under both the Sixth Amendment and the Due Process Clause. Pet. App. 11a-15a. The Supreme Court of South Carolina decided both claims. *Id.* at 2a. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Turner's citation of the *Mathews* balancing test is simply "a new argument to support what has been [a] consistent claim"—that depriving an indigent of appointed counsel when he faces incarceration violates due process. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Walker*, 768 F.2d at 1183-1185.

C. There Are No Other Vehicle Problems

Respondents speculate (Opp. 23) that the outcome here might have been the same even if Turner had been provided counsel. Citing Turner's drug use and unfounded speculation that Turner chose to remain unemployed, respondents insinuate that Turner could not have established an inability-to-pay defense even with a lawyer's assistance. *Id.*; *see also id.* at 11.[2] But re-

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[1] In light of this Court's decisions establishing actual incarceration as the touchstone for the right to counsel, the *Mathews* analysis is unnecessary where a defendant faces incarceration. Pet. 25 & n.14. The petition raised *Mathews* balancing as an alternative to this actual-imprisonment rule. *Id.*

[2] Respondents note that payments were occasionally made on Turner's behalf. As the petition explains (Pet. 8 n.4), the family court ordered wage-withholding on the occasions when Turner

spondents do not dispute that Turner is indigent, and they concede (*id.* at 30 n.7) that a defendant who cannot pay court-ordered support may not be sanctioned in a civil contempt proceeding. A lawyer could have assisted Turner in presenting this defense and addressing any argument that the inability-to-pay defense should not apply. How that question would ultimately have been determined does not preclude this Court's review of the right-to-counsel question.

III. The Decision Below Is Erroneous

A. A Defendant Facing Incarceration Is Entitled To Appointed Counsel

As shown, an indigent individual in jeopardy of losing his physical liberty has a right to appointment of counsel. Pet. 19-29. This principle holds whether the proceeding is civil or criminal, for "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18, 25 (1981); *see Alabama* v. *Shelton*, 535 U.S. 654, 661 (2002); *In re Gault*, 387 U.S. 1, 36-37 (1967).[3]

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was able to obtain employment. DSS also intercepted any state or federal benefits to which Turner was entitled. For example, family court records indicate that the 2006 payment of $1404 that respondents highlight was the result of such an intercept.

[3] Like the court below, respondents advance the formalistic argument that no right to counsel applies in civil contempt proceedings because, unlike in a criminal prosecution, the civil contemnor "'carries the keys of his prison in his own pocket.'" Opp. 28-29. For the reasons set forth in the petition (Pet. 24-29), this argument fails.

Respondents cite only two cases in which this Court held that an individual facing a loss of physical liberty had no categorical right to counsel. Neither decision supports the judgment below.

In *Middendorf* v. *Henry*, 425 U.S. 25 (1976), this Court upheld the military's use of summary courts-martial to try servicemembers for minor offenses without counsel. The Court held that special considerations applicable to the military distinguished summary courts-martial from civilian proceedings in which the right to counsel had been held to apply. *Id.* at 37-48. The Court further emphasized that servicemembers had the right to refuse trial by summary court-martial and be tried instead at a special or general court-martial at which counsel would be provided. *Id.* at 28-29, 46-48.

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973), is similarly distinguishable. There, the Court held that indigent probationers are not categorically entitled to appointed counsel in all revocation proceedings. *Id.* at 786-791. Rather, due process requires appointment of counsel on a case-by-case basis. *Id.* at 788-791. The probationer enjoyed only a "limited due process right" because he had "been convicted of a crime" in a previous proceeding at which the sentence of incarceration was imposed. *Id.* at 789; *see also id.* at 779. Thus, as the Court recently recognized, the "dispositive factor" in *Gagnon* was that the probationer "had a recognized right to counsel when adjudicated guilty of the felony offense" of which he was originally convicted and sentenced. *Shelton*, 535 U.S. at 664; *see also id.* at 665.

B. Respondents' Remaining Arguments Do Not Support The Judgment Below

1. Respondents contend (Opp. 24) that no right to counsel applies unless the defendant faces an "imbalance of prosecutorial power." *See id.* at 27, 33-34. Here, respondents assert (*id.* at 25), Turner had no right to counsel at the contempt hearing because he faced "only a *pro se* mother."

Respondents' assertion is meritless. Each step in the proceedings to enforce Turner's child-support obligations resulted from actions taken by the Department of Social Services (DSS) or the family court. *See supra* p. 3; *see also* Pet. 4-5, 6-9. Pursuant to court rules, the court clerk automatically issued the rule to show cause that led to Turner's contempt in this case. The court issued a bench warrant for Turner's arrest and conducted the hearing as an inquisition into Turner's failure to pay. And Turner was incarcerated in the county jail. None of these proceedings was a private matter between private litigants, and none depended on Rebecca Price's involvement.[4]

2. Respondents next argue that Turner faced no "stigma" resulting from the contempt order. *See, e.g.*, Opp. 27-28. But the existence of stigma is not and never has been the test for applying the right to counsel. The cases cited by respondents—to the extent they address the right to counsel at all—do not support this proposition. *Id.* To the contrary, this Court has "repeatedly emphasized actual imprisonment as the

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[4] Indeed, the State has begun to garnish the wages of Rebecca Price, who is now a non-custodial parent with child-support obligations of her own. IFP Aff. of Rebecca L. Rogers.

touchstone of entitlement to appointed counsel." *Shelton*, 535 U.S. at 675 (Scalia, J., dissenting); *see also Lassiter*, 452 U.S. at 25.

Moreover, the suggestion that civil contempt for failure to pay child support carries no stigma is unsustainable. Respondents' brief repeats several public sources that refer to parents like Turner as "'deadbeat[s]'" who have "'abdicat[ed] [their] moral and legal dut[ies].'" Opp. 4 & n.1. DSS posts photographs online of "delinquent parents" and encourages the public to help "bring [the parents] to justice."[5] There is no doubt that a parent who fails to pay child support faces public opprobrium. Twelve months' incarceration surely does not lessen that stigma.

3. Respondents contend (Opp. 36-37) that the issues in child-support cases are "straightforward" and "rarely complex." But this Court's right-to-counsel decisions do not turn on the perceived complexity of the specific issues or defenses involved. Moreover, as the petition showed (Pet. 15, 26-28), defending against civil contempt charges in child-support cases can be challenging. To establish an inability-to-pay defense, the defendant must prove the circumstances of his failure to pay through competent evidence and argue that, under the law, he could not be incarcerated in light of those facts. For example, respondents speculate that Turner could not establish an inability-to-pay defense in light of his eligibility for work release.[6] Resolving

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[5] *See* http://www.state.sc.us/dss/csed/delinq.htm (last visited Oct. 4, 2010).

[6] There is no precedent to support that proposition. Moreover, the court's notation that Turner was eligible for work release (Pet. App. 8a) is merely a prerequisite to participation in work re-

such issues in a contempt hearing requires the assistance of counsel.[7]

4. Respondents contend (Opp. 35-36) that requiring appointment of counsel would cost too much and strain public defenders. But numerous States already require the appointment of counsel for indigent civil contempt defendants, and respondents cite no evidence that doing so has caused any undue burden or compromised the quality of legal representation. To the contrary, appointed counsel function effectively in civil contempt cases in States where the right to counsel has been recognized and improve proceedings' efficiency and accuracy. NACDL Br. 18-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

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lease and does not bind the detention center, which conducts additional screening consistent with Department of Corrections regulations. S.C. Code Ann. § 24-13-910. And even assuming the detention center permitted Turner to work—and assuming a job was available—any wages Turner received could not reasonably be expected to cover his entire arrearage, particularly when a portion would be garnished to offset the cost of his incarceration, *id.* § 24-13-930.

[7] The standards governing financial eligibility for appointment of counsel place far less burden on defendants than the question whether a civil contemnor may be incarcerated. *See, e.g.*, 18 U.S.C. § 3006A(b) (trial court must advise defendant of right to counsel and inquire whether defendant is financially unable to obtain counsel); *cf.* Opp. 36-37.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 10-10

IN THE

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MICHAEL D. TURNER,
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REBECCA PRICE AND SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICI CURIAE* CENTER FOR FAMILY POLICY AND PRACTICE, PROFESSOR ELIZABETH G. PATTERSON, SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER, AND SOUTH CAROLINA CENTER FOR FATHERS AND FAMILIES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. INCARCERATION OF DESTITUTE PARENTS FOR NONPAYMENT OF CHILD SUPPORT IS A WIDESPREAD PROBLEM IN THE UNITED STATES	5
A. Child Support Reforms Have Targeted "Deadbeat Dads" In Order To Improve The Economic Condition Of Poor Children And Recoup Government Welfare Costs	5
B. The Vast Majority Of Child Support Debt In The United States Is Owed By Destitute Nonresident Parents Who Lack The Means To Pay	7
C. The Poorest Noncustodial Parents Are The Most Likely To Face Incarceration For Nonpayment Through The Civil Contempt Process, Even Though Such Harsh Enforcement Measures Were Developed With "Deadbeat Dads" In Mind	12
II. ADMINISTRATION OF SOUTH CAROLINA'S CIVIL CONTEMPT SYSTEM IN CHILD SUPPORT CASES CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE "COERCIVELY" INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT	15

TABLE OF CONTENTS—Continued

Page

A. South Carolina Imprisons Large Numbers Of Child Support Obligors On Civil Contempt Charges 16

B. Observations Of Civil Contempt Hearings Involving Nonpayment Of Child Support In South Carolina Confirm That A Large Number Of Indigent Obligors Are Being Incarcerated Despite Their Inability To Comply With The Court Order 17

C. Recognition Of A Right To Counsel In Civil Contempt Proceedings That Could Result In Incarceration Of An Indigent Child Support Obligor Would Not Burden The Effectiveness Of The Child Support Enforcement System, The Legal Profession Or State Budgets 19

1. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not burden the effectiveness of the child support enforcement system 19

2. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not unduly burden the legal profession or state budgets ... 22

TABLE OF CONTENTS—Continued

Page

III. THERE IS A HIGH RISK OF ERRONEOUS INCARCERATION IN CIVIL CONTEMPT PROCEDURES INVOLVING INDIGENT CHILD SUPPORT OBLIGORS WHO ARE UNREPRESENTED BY COUNSEL 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES — Page

Hicks v. Feiock, 485 U.S. 624 (1988) 23
International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 831 (1994) 23, 24-25
Michael F. v. Sharon R., No. OT-00-034, 2001 WL 227068, 2 (Ohio Ct. App. 2001). 9
Pasqua v. Council, 892 A.2d 663, 673 (N.J. 2006) 24
Price v. Turner, 387 S.C. 142, 691 S.E.2d 470 (2010) 23
Sevier v. Turner, 742 F.2d 262, 265-66 (6th Cir. 1984) 20
Shillitani v. United States, 384 U.S. 364, 371(1966) 23
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IN THE

Supreme Court of the United States

No. 10-10

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA PRICE AND SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICI CURIAE* CENTER FOR FAMILY POLICY AND PRACTICE, PROFESSOR ELIZABETH G. PATTERSON, SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER, AND SOUTH CAROLINA CENTER FOR FATHERS AND FAMILIES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST [1]

The Center for Family Policy and Practice (CFFPP) is a nonprofit public policy organization that focuses

[1] No counsel for a party authored this brief in whole or in part, and no persons or entities, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Counsel for the parties received timely notice of the intent to file this brief, and letters from the parties consenting to the filing of this brief are on file with the Clerk.

on the nationwide impact of national and state welfare programs, fatherhood initiatives, and child support policy on parents and their children who navigate the family and social welfare systems without legal representation. CFFPP was established in 1995 by the Ford Foundation under the Strengthening Fragile Families Initiative. Recognizing the limited advocacy and policy analysis of these issues from the perspective of very low-income men of color, CFFPP's mission has been to concentrate on the perspective of those individuals, providing also public education and technical assistance on the challenges and barriers unique to those individuals and their families. CFFPP has tax-exempt status under federal and state laws.

Elizabeth G. Patterson is a legal scholar who has studied and published on the federal/state child support enforcement program and its impact on low-income noncustodial parents. She is a Professor of Law at the University of South Carolina School of Law and for four years was State Director of the South Carolina Department of Social Services, the agency that administers the child support enforcement program in South Carolina. Professor Patterson has conducted both empirical and scholarly research on South Carolina's child support enforcement program. She is the author of "Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison," 18 Cornell Journal of Law and Public Policy 95 (2008).

For more than 20 years SC Appleseed has engaged in advocacy and education to assure that statutes address the needs of the underprivileged and that our legal system is looking out for those most in need. SC Appleseed has published a large number of educa-

tional materials for low-income persons, including material for parents involved in the child support enforcement system.

Since 2002 the SC Center for Fathers and Families has worked with community-based fatherhood programs and many state and community partners to provide comprehensive services to more than 7,000 low-income fathers and to advocate for father-friendly policies and practices. The Center has worked closely with South Carolina's Child Support Enforcement and Court Administration to implement an alternative to incarceration for low-income non-custodial parents who are found in contempt for non-payment of child support. Based on our experience, many low-income noncustodial parents do, in fact, desire to provide financial and emotional support, but do not have the means to do so without support services. Also, many non-custodial parents cannot satisfactorily articulate or document their circumstances and consequently are often found in contempt. While the appointment of an attorney alone will not ensure consistent future payments, we support the need for court-appointed attorneys to ensure that low-income parents have the opportunity to be heard particularly when jail time may be the end result.

SUMMARY OF ARGUMENT

Petitioner Michael Turner's experience is no anomaly; across the United States, destitute, noncustodial parents are incarcerated for failing to meet child support obligations they have no means to pay. This is despite the fact that child support law and policy is targeted elsewhere—at so-called "deadbeat dads" who have the ability to pay but choose not to.

Inflexible application of child support collection and enforcement measures—measures that are designed to ensure that child support payments are "automatic and inescapable" no matter the circumstance—lead to this devastating phenomenon when applied to the chronically poor. This is among the reasons why it is so vital that the Court grant certiorari in this case.

Although effective in securing payments from noncustodial parents with the means to pay, the impact of these reforms on low-income noncustodial parents and their families has been disproportionate and destructive. Today, the vast majority of child support owed in the United States is owed by noncustodial parents who live in poverty. These parents lack the means to pay their child support debt, yet they experience the full panoply of enforcement measures, including civil incarceration for nonpayment of support. Ironically, low-income noncustodial parents who lack the ability to pay their child support debts are more likely to face incarceration than are noncustodial parents who have the means to pay child support and refuse to do so. This is because other, less severe enforcement measures are effective in securing support from those with the means to pay. The end result is that jails across the United States are filled with low- and no-income parents who have been incarcerated (largely through civil contempt processes) for nonpayment of child support.

In South Carolina, where Michael Turner was incarcerated, approximately 15% of the jail population is made up of child support obligors imprisoned for civil contempt. The hearings that lead to these sanctions are brief and cursory, and they present a high risk that child support obligors who lack the means to comply with the court order are being coer-

cively confined. In the absence of a right to counsel, it is almost certain that low-income and no-income child support obligors will not be able to effectively assert the defense of inability to comply, and will continue to be improperly incarcerated.

ARGUMENT

I. INCARCERATION OF DESTITUTE PARENTS FOR NONPAYMENT OF CHILD SUPPORT IS A WIDESPREAD PROBLEM IN THE UNITED STATES

A. Child support reforms have targeted "deadbeat dads" in order to improve the economic condition of poor children and recoup government welfare costs

Child support reforms in the 1980s and 1990s were designed to increase noncustodial fathers' financial support of their children and thus reduce the dependence of poor children and their custodial parents on public welfare assistance.[2] Equally important, the reforms served the goal of welfare cost recovery, the government practice of seeking reimbursement of welfare costs through child support enforcement.[3] Key elements of the laws included: (1) expanded and streamlined paternity establishment procedures; (2) the introduction of a national directory of new hires to track delinquents; (3) implementation of wage withholding to increase collections; and (4) mandatory administrative enforcement remedies, including

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[2] Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759.

[3] *See* Child Support Act of 1974 § 454, 42 U.S.C. § 654 (1994).

procedures to revoke drivers' and professional licenses.[4] The scheme of reforms created a system that is more streamlined and automated, less reliant on judicial involvement, and, particularly with respect to enforcement methods, more stringent and punitive.[5] As one commentator pointed out, the new child support provisions were designed to ensure that child support payments are "automatic and inescapable."[6]

The far-reaching reforms of 1996, in particular, were propelled by widespread societal hostility toward "deadbeat dads," a term that was applied indiscriminately to all noncustodial fathers who failed to support their children.[7] The public viewed all nonpaying fathers as men who could afford to pay support but flagrantly chose not to, depriving their children of desperately needed economic support. At the time, scant attention was paid to fathers who were characterized as "turnips,"[8] fathers who have insufficient income to pay child support because they are young, uneducated, and lack significant work experience. Subsequent empirical studies confirm

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[4] Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 252-56 (2000).

[5] *Id.*

[6] Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538 (1996).

[7] Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 263-64 (2000).

[8] Young, uneducated, never-married noncustodial parents who lack income to pay child support are called "turnips" after the phrase "You can't get blood from a turnip." Mincy & Sorensen, *Deadbeats and Turnips in Child Support Reform*. J. POL'Y ANAL. & MGMT. 17(I): 44-51 (1998).

that as many as 33% of noncustodial fathers are indeed "unable nonpayers."[9] The researchers' conclusion—that it would be futile to pursue child support from these impoverished fathers—has been borne out.[10] As set forth below, unnecessarily harsh laws place the poorest fathers in an economically untenable position by setting child support orders at levels that exceed their capacity to pay and then later punishing them for shirking their responsibilities when they are inevitably delinquent.

B. The vast majority of child support debt in the United States is owed by destitute nonresident parents who lack the means to pay

Child support laws purport to treat all nonresident parents alike in terms of holding them financially responsible for their children, with no exceptions for low-income fathers. However, the goal of recouping welfare expenditures incentivizes the state to aggressively pursue collections from the very poorest parents, rather than from middle- or upper-income parents, who are not welfare-reliant.[11] The sad irony is that, as a result, noncustodial parents with the least capacity to pay child support are also the

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[9] Crowley, THE POLITICS OF CHILD SUPPORT IN AMERICA 164 (2003) (citing Mincy & Sorensen, *Deadbeats and Turnips in Child Support Reform*. J. POL'Y ANAL. & MGMT. 17(I): 44-51 (1998)).

[10] *Id.*

[11] May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center for Family Policy & Practice (2004) *available at* http://www.cffpp.org/publications/effect_child.html.

parents who have the greatest likelihood of experiencing the most severe penalties for nonpayment.[12]

Low-income and even no-income parents have been acknowledged by the U.S. Office of Child Support Enforcement (OCSE) to be responsible for the greatest portion of unpaid child support. According to OCSE, of the more than $70 billion in child support debt nationally, 70% of all arrears due to the government (as reimbursement for welfare expenditures) are owed by noncustodial parents who have no quarterly earnings or earn less than $10,000 annually.[13] Only 4% of child support arrears are held by noncustodial parents with more than $40,000 in annual income.[14] The problem is nationwide; the child support caseloads in every state include very low income fathers who have accumulated enormous arrearages and who have virtually no prospect of ever paying them off.[15]

Congress's assumptions in designing the child support enforcement statutes were based on studies indicating that most unwed fathers could pay some financial support for their children, and that their

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[12] *Id.*

[13] Ovwigho, Saunders & Born, *Arrears Leveraging Pilot Project Outcomes Achieved and Lessons Learned*, FAMILY WELFARE RESEARCH TRAINING GROUP (2005).

[14] U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* (2004) *available at* http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28.htm.

[15] May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center for Family Policy & Practice 9 (2004) *available at* http://www.cffpp.org/publications/effect_child.html.

incomes tend to rise within the few years after paternity is established.[16] This view, coupled with improvements in the effectiveness of the child support system, has led to significant increases in the number of low-income nonresident parents who are legally obligated to pay.[17] The amount of child support that they must pay, however, often outstrips their ability. This results, in part, from the practice of "imputing income" when setting support orders and from not modifying existing orders downward when circumstances warrant.[18] The court may impute to the obligor the ability to earn the minimum wage, or it may simply take a stab in the dark.[19] The court generally assumes a 40 hour work week, and generally overestimates the income of the low income parents, who often work less than 40 hours a week.[20] In addition, because poor parents lack access to courts and counsel, courts rarely modify child support

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[16] Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).

[17] Sorenson, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANALYSIS & MGMT. 604 (2002).

[18] Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).

[19] *See Id. See also Michael F. v. Sharon R.*, No. OT-00-034, 2001 WL 227068, 2 (Ohio Ct. App. 2001) (finding that the court may exercise broad discretion when imputing income).

[20] Pearson & Griswold, *New Approaches to Child Support Arrears*, POL'Y & PRAC. OF PUB. HUMAN SERVS., 33 (2001), *available at* http://www.ancpr.org/new-approachestoschild support_.htm

orders downward when earnings decline.[21] These practices result in child support orders that often exceed 50% of reported earnings among low-income fathers.[23]

These practices do not realistically take account of the large number of noncustodial parents who are as poor as the custodial parents and children, who are themselves receiving welfare benefits, and who have problems getting and keeping jobs. Most of the fathers who do not pay child support payments are poor and unable to find jobs that would enable them to pay child support.[23] About 35% of nonresidential fathers (about 3.6 million) are poor, and the vast majority of this group (over 90%) does not pay any child support.[24] These fathers earned an average of $4,221 annually, compared to $34,967 annually for non-poor noncustodial fathers.[25] Only one-quarter of noncustodial fathers with incomes less than 130% of the poverty line worked full-time year round, and their average income was just $6,989 (just above the

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[21] Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95 (2008).

[23] Sorensen, Sousa, & Schaner, *Assessing child support arrears in nine large states and the nation*. Washington, DC: Urban Institute (July 11, 2007).

[23] Sorenson, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANALYSIS & MGMT. 604 (2002).

[24] Sorensen E, Zibman C., *Getting to know poor fathers who do not pay child support*. 75 SOC. SERV. REV. 420, 420–34 (2001).

[25] Levine, THE ECONOMIC STATUS OF NONCUSTODIAL FATHERS OF CHILDREN ON WELFARE 4-5, 13 (2002).

$6,800 poverty level for a single adult).[26] Further, one study found that 60% of poor fathers who do not pay child support are racial and ethnic minorities, and 29% were institutionalized (mostly in prison) at the time of the interview.[27] Only 43% of the men not in prison were currently working, and those employed at all in 1996 worked an average of just 29 weeks and earned $5,627 that year.[28] Their barriers to employment[29] were also considerable: 43% were high-school dropouts, 39% had a health problem, and 32% had not worked in three years.[30] Generally, there are few employment opportunities for nonresident parents with weak work histories and limited education or training who live in neighborhoods of poverty.

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[26] Sorensen E, Lerman R., *Welfare reform and low-income noncustodial fathers*. 41 CHALLENGE 101 (1998).

[27] Sorensen E, Zibman C., *Getting to know poor fathers who do not pay child support*. 75 SOC. SERV. REV. 420, 420–34 (2001).

[28] *Id.*

[29] Welfare program administrators classify certain welfare recipients as "hard to employ" because of characteristics which act as "barriers to employment." Barriers to employment include: limited education, limited work skills, addictions, criminal records, and physical and mental health problems. *See, e.g.*, LOPREST *et al.*, *Policies For The Hard To Employ: Understanding State Approaches And Future Directions* (2007), *available at* http://www.urban.orgfUploadedPDF/411501_ hardtoemploy.pdf.

[30] *Id.*

C. The poorest noncustodial parents are the most likely to face incarceration for nonpayment through the civil contempt process, even though such harsh enforcement measures were developed with "deadbeat dads" in mind

The accumulation of unrealistic and excessive child support debts results in large part from subjecting impoverished noncustodial parents to an "automatic and inescapable" child support system that has reimbursement of welfare benefits as its primary focus and far too often does not account for the parents' inability to pay. The low-income nonresident parent who lacks attorney representation experiences the child support system as a virtually unstoppable chain of events that leads inevitably to unfathomable levels of debt that they have no hope of ever paying off. First, many parents are not even aware of the initial proceedings and fail to appear in court because, due to their poverty and unstable housing situations, they did not receive a copy of the summons directing them to appear.[31] If they fail to appear, the court will enter default paternity establishment and child support orders.[32] Second, when establishing child support orders involving low- or no-income noncustodial parents, it is common for courts to base the support amount on an imputed minimum wage that exceeds the parent's actual earnings.[33] Third, in addition to

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[31] May and Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, CENTER FOR FAMILY POLICY & PRACTICE 40 (2005) *available at* http://www.cffpp.org/publications/index.html.

[32] *Id.*

[33] *Id.*

the monthly child support amount set by the court, the very poorest nonresident parents (those who have children with a parent who receives government benefits) have even more costs imposed on them.[34] Finally, given these circumstances, it is not surprising that many low-income noncustodial parents experience the full weight of the child support enforcement process. The least severe enforcement tools (such as wage garnishment, property liens and tax refund intercepts) will simply not be effective in collecting past due child support from noncustodial parents who lack stable, consistent employment and assets. Having failed to collect support by utilizing these lesser sanctions, the child support system turns to more aggressive enforcement measures. Though such tools were established to collect unpaid support from deadbeat dads—those able but unwilling to pay—it is the low-income parent who most likely faces the threat of incarceration through the civil contempt process. Consequently, the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay.

The Center for Family Policy and Practice (CFFPP), which has been studying the challenges and barriers faced by low-income fathers since 1995, examined the intersection of child support and incarceration (civil contempt and criminal charges for non-

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[34] "Many states charge fees such as the cost for the birth of the child, or start arrearages climbing immediately with the imposition of retroactive child support that dates back as far as the birth of the child in some states, or in others, to the beginning of welfare receipt." *Id.* at 9. The accrual of interest (as high as 12% in some states) on the debt leads to yet higher arrearages. *Id.*

payment of child support) in several publications.[35] In its studies of this issue, CFFPP found that in most states there were reports of civil contempt arrests and incarcerations for nonpayment of child support.[36] CFFPP's studies examining data at the local level in Wisconsin confirmed that the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay. The study revealed that in Madison and Milwaukee there is a higher rate of arrests for nonpayment of child support for low-income minority parents than for other parents.[37]

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[35] In addition to highlighting the issues of civil and criminal charges for non-payment of child support, CFFPP publications have highlighted the consequences of incarceration on these men such as the loss of employment. The publications include the following; Financial Literacy and Low-Income Noncustodial Parents, Child Support Handbook, Fatherhood Programs and Public Policy, Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers, and Children, Negotiating the Child Support System: Report from a Discussion of Policy and Practice, Negotiating the Child Support System, Recommendations from a Discussion of Policy and Practice, and the Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents.

[36] May and Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, CENTER FOR FAMILY POLICY & PRACTICE 40 (2005) *available at* http://www.cffpp.org/publications/index.html.

[37] May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center for Family Policy & Practice 14-15 (2004) (the data in this study groups together felony, misdemeanor and civil contempt proceedings for nonpayment of child support) *available at* http://www.cffpp.org/publications/effect_child.html.

While an efficient and justifiable tool for able-to-pay parents, when such practice is applied to all noncustodial parents regardless of ability to pay, primarily poor parents will end up in jail. For a destitute person, civil contempt is an inappropriate remedy to secure payment of a child support obligation: the party cannot be coerced into paying child support that instant, because they have no funds to pay it. Because the goal of civil contempt is to obtain compliance with the trial court's orders, the justification for imprisonment is lost when that compliance is impossible.

II. ADMINISTRATION OF SOUTH CAROLINA'S CIVIL CONTEMPT SYSTEM IN CHILD SUPPORT CASES CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE "COERCIVELY" INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT

That the civil contempt system for enforcing child support does in fact erroneously incarcerate persons who lack the ability to pay the ordered support is illustrated by the facts of Michael Turner's case, which are replicated in numerous other cases in South Carolina and other states. Michael Turner at his contempt hearing stated that his non-payment was due to drug addiction and physical disability, both of which limited his earning potential. The judge's only reaction to Turner's statement was to say "okay" and change the subject. Without any further discussion of Turner's ability to pay—whether at the time the support payments were due or at the time of the contempt hearing—the court found him in "willful contempt" and sentenced him to twelve months'

incarceration subject to a purge amount of $5,728.76 (the total amount of the arrearage).

A. South Carolina imprisons large numbers of child support obligors on civil contempt charges

The Turner case typifies the administration of the child support contempt process in South Carolina, where on any given day there are approximately 1,500 civil contemnors confined for nonpayment of child support.

In 2005 and again in 2009 Professor Elizabeth Patterson of the University of South Carolina School of Law surveyed county sheriffs and jail administrators in the state to determine the number of child support contemnors confined in the state's jails on civil contempt charges.[38] Responses were received from 31 of the state's 46 counties in 2005 and from 35 counties in 2009. Only three small counties failed to respond to either survey.

In 2005 the sheriffs reported a total jail population of 8,251 in 31 counties, with 1,335 of these being child support contemnors. The figures were similar in 2009: a total jail population of 9,624 in 35 counties, 1,413 being child support contemnors. In both surveys, child support contemnors constituted approximately 15% of the total jail population statewide.

Individual county jails had substantially higher proportions of child support contemnors. In ten counties, child support contemnors made up at least 20%

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[38] The numbers reported are classified by the jails as "family court detainees," which includes a very small number of contemnors other than child support obligors. Only civil contemnors are included in the category of "family court detainees."

of the jail population. In four, they constituted 25% or more.

B. Observations of civil contempt hearings involving nonpayment of child support in South Carolina confirm that a large number of indigent obligors are being incarcerated despite their inability to comply with the court order

Preliminary data from an ongoing study of child support contempt hearings in South Carolina[39] suggest that many of those sentenced to jail for contempt are unable to pay the court-ordered child support, and thus cannot constitutionally be jailed in civil proceedings. Family courts in South Carolina hold contempt hearings on specific days that are set aside for that purpose. Researchers conducting the study observe these hearings and record specified information about the contemnor and the hearing. To date researchers have observed 230 hearings in 11 counties. These counties represent a cross section of the state in regard to geographical region, county population and demographics, and judicial districts. Although data collection and analysis are still in process, the information gathered to date supports the following observations.

Of the 211 obligors who appeared before the court in civil contempt hearings observed by the researchers, 97 persons or 46% were held in contempt. None of these contemnors was represented by counsel.

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[39] This study, which commenced in June 2010, is being conducted by Professor Elizabeth G. Patterson of the University of South Carolina School of Law.

There is compelling evidence that a large proportion of those held in contempt were indigent. Almost two-thirds of the obligors who were held in contempt stated that they were or had been unemployed. Twenty percent of those held in contempt stated that they had a disability or injury that limited their employability. Others had been in jail—some on a previous civil contempt sentence—or were impaired by addictions.

The conclusion that a large proportion of incarcerated child support contemnors in South Carolina are indigent receives further support from a study of 1,027 contemnors in eight South Carolina counties who were ordered to participate in a fatherhood program in lieu of a jail sentence during the years 2006-2008. The Center for Fathers and Families, which administers the fatherhood program, found that 40% of contemnors ordered into the program had less than a high school education and 78% lived with their mothers.

The average length of hearings that led to a finding of contempt was less than four minutes. Only in four of the eleven counties did any hearing exceed eight minutes.

Despite the factors indicating that obligors held in contempt are likely to be indigent, according to the researchers the South Carolina judges observed tended to be either skeptical or uninterested in assertions of inability to pay. The only evidence taken of such defense was generally a brief assertion by the obligor. Half of the judges observed asked no or few follow-up questions before declaring the obligor in contempt. The researchers indicated that judges who did ask questions appeared to be looking for some minor flaw in the obligor's story that could justify

their rejection of it. When judges made findings related to the obligor's employability, they appeared to the researchers to give no consideration to the job market, but only to the obligor's capacity to work.

In the majority of cases, no attempt was made to determine a reasonable purge amount. In one county the judge set the same purge amount ($500) for every obligor who was held in contempt. In another, the purge amount in each case was set at the full amount owed.

Occasionally judges indicated an awareness that they were incarcerating persons who were unable to pay. One judge stated to the researcher: "We probably shouldn't be holding these people in contempt. It's supposed to be willful contempt, which means they have the ability to pay. Most people here are probably telling the truth that they can't pay. There's a lot of unemployment down here."

C. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not burden the effectiveness of the child support enforcement system, the legal profession or state budgets

1. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not burden the effectiveness of the child support enforcement system

There is no reason for believing that provision of an attorney for child support obligors who face impri-

sonment for nonpayment would impair achievement of the important goal of obtaining economic support for children of nonresident parents. Although assistance of counsel would undoubtedly reduce the number of indigent persons imprisoned for civil contempt, imprisonment of these persons is counterproductive to the goals of the program in any event. Civil incarceration can further the goals of the child support enforcement program only if it produces support payments that were otherwise unavailable to the child and his or her custodial parent. If the obligor is unable to pay, this goal cannot be achieved. Instead, imprisonment will have a variety of effects antithetical to program goals. Most fundamentally, few obligors will generate income while incarcerated,[40] and incarceration may have a deleterious effect on their employment prospects upon release. Thus imprisonment will further disable them from paying the required support.[41] While imprisoned, the contemnor is also disabled from providing any other form of support or assistance to the child or the custodial parent, including the social relationship between parent and child with its varied emotional and psychological benefits for the child. Moreover, the prospect of imprisonment causes some indigent parents to "go underground," subsisting through sources of income that will not reveal the individual to the child support enforcement system. As a result,

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[40] Some child support contemnors are able to engage in compensated work release while incarcerated.

[41] There are reported cases in which imprisonment caused contemnors to lose jobs from which wage withholding was providing or could have provided some level of support. *E.g.*, *Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

the child is deprived of both the social relationship with the parent and whatever economic support might have been obtainable from him or her.

The federal child support enforcement legislation integrates a wide variety of mechanisms to enhance the state's ability to collect child support from nonresident parents and include automated tools for locating parents, administrative tools for expediting establishment of paternity and entry of support orders, and legal tools for withholding wages, seizing financial assets, and coercing compliance through, *e.g.*, revocation of driver's licenses. In laying out this comprehensive system, however, the statute makes no reference to civil contempt.[42] Congress's failure to mention this mechanism supports the contention that civil contempt sanctions play no central role in assuring that children receive economic support from nonresident parents.

To the extent that assistance of counsel prevents incarceration of those unable to pay, therefore, it merely avoids effects counterproductive to the goals of the program.

Moreover, assistance of counsel can have the sanguine effect of promoting the development of a reasonable payment plan for the obligor, a much more effective mechanism for achieving the goals of the program. Indeed, one South Carolina judge

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[42] *See, e.g.*, 42 U.S.C § 666 (outlining the array of enforcement tools a state must have in place, and providing in subsection 15 for court-ordered payment plans or work activities where obligor is in arrears, but making no mention of contempt or incarceration). *See generally* Legler, The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act, 30 Fam. L. Q. 519 (1996).

stated to a researcher that he is more likely to "work with" obligors who have attorneys.

2. Recognition of a right to counsel in civil contempt proceedings that could result in incarceration of an indigent child support obligor would not unduly burden the legal profession or state budgets

Recognition of a right to counsel for child support obligors facing imprisonment should not be unduly burdensome on the legal profession or on the budgets of states that compensate appointed counsel. A variety of mechanisms can administratively screen obligors who are in arrears to identify those who are candidates for coercive judicial sanctions, thus reducing the number who appear before the court and the number who are considered for incarceration. In at least two South Carolina counties, obligors who are ruled in are first assessed by administrative personnel who attempt to negotiate payment plans or some other consensual resolution of the case. Only those whose cases cannot be resolved administratively and who are deemed appropriate for coercive judicial sanctions are referred for a contempt hearing. Administrative triage of this sort can dramatically reduce the number of cases in which appointed counsel would be necessary.

III. THERE IS A HIGH RISK OF ERRONEOUS INCARCERATION IN CIVIL CONTEMPT PROCEDURES INVOLVING INDIGENT CHILD SUPPORT OBLIGORS WHO ARE UNREPRESENTED BY COUNSEL

Michael Turner was deprived of his liberty pursuant to a civil proceeding in which he was not accorded a right to counsel and the court appeared to make little effort to assure accuracy in the finding of critical facts before depriving him of his liberty. The justification for the absence of procedural protections in civil contempt proceedings is said to rest on the conditional nature of the imprisonment. *See Price v. Turner*, 387 S.C. 142, 691 S.E.2d 470 (2010). Imprisonment for civil contempt is not punitive, but rather is intended to coerce compliance with an order of the court. The contemnor can obtain his release at any time by complying with the court order, and hence is said to "hold the keys to his prison in his own pocket". *Id.* It is this conditional nature of civil contempt imprisonment that has caused courts to treat it as having less due process significance than criminal imprisonment and to tolerate the use of a minimalist civil process in imposing this sanction. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994).

This justification becomes mere verbiage if the purge condition is one with which the contemnor is unable to comply. *See Shillitani v. United States*, 384 U.S. 364, 371(1966); *accord Hicks v. Feiock*, 485 U.S. 624, 637 n.9 (1988). In such a case the sanction loses its conditional nature and can only be characterized as punitive. *See Bagwell*, 512 U.S. at 831. It is likely that a substantial portion of those threatened with

jail for nonpayment of child support are in fact unable to pay the ordered support.[43] Accurate determination of whether or not they are able to comply is critical to the validity of the coercive incarceration which is the only type of incarceration that can validly be imposed in a civil proceeding. The risk of an erroneous determination on this issue is substantial for the alleged contemnor who is without the assistance of counsel. *See, e.g., Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006).

The risk that an unrepresented indigent defendant will be erroneously incarcerated is increased by the potential for abuse by the trial court of its considerable discretion in a civil contempt proceeding. This Court has noted on multiple occasions the high risk of abuse in a proceeding where the judge who was offended against has such broad, discretionary, and virtually unreviewable authority.[44] The emotional component of a contempt proceeding may lead even the most conscientious judge to an abuse of discretion: "Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament and its fusion of legislative, executive, and judicial powers summons forth the prospect of the most tyrannical licentiousness." *Bagwell*, 512 U.S. at 831 (citations

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[43] Because civil contempt is the "last resort" in child support collection, those facing jail in a contempt proceeding are persons as to whom wage withholding and other enforcement tools have been unavailing. Thus normally only those without accessible resources would end up before the court on a contempt charge.

[44] A deferential "abuse of discretion" standard is used in appellate review of civil contempt cases. *See* Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol. 95, 135-36 (2008).

omitted). That this potential is often realized is evidenced in a number of reported cases.[45]

Michael Turner and many other child support obligors have been deprived of liberty pursuant to civil proceedings in which they were not accorded the vital right to assistance of counsel. These low-income and no-income parents have been confined under the guise of coercing them to pay child support when they lack the means to comply. Available information concerning the conduct of civil contempt proceedings against indigent child support obligors demonstrates that these persons cannot obtain a fair hearing without counsel to insist upon regularity of the proceedings and to assist the obligor in presenting the defense of inability to pay.

CONCLUSION

The Court should grant the petition for the writ of certiorari.

Respectfully submitted,

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July 29, 2010

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[45] *See Id.*

AMICUS CURIAE BRIEF

Case No. 10-10

In the

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA PRICE AND
SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The Court Has Already Recognized That Indigent Defendants In A Civil Action Have A Right To Appointed Counsel When Loss Of Liberty Is At Stake; It Should Therefore Grant The Petition And Reverse The South Carolina Supreme Court In Order To Resolve Any Confusion For Those States Failing To Apply That Standard 9

A. "Fundamental Fairness" Requires Counsel To Be Made Available Absent The Defendant's Specific Waiver of the Right In Any Proceeding That Results In Loss Of Liberty 10

B. It Is Illogical For The Minority States To Require Counsel For Defendants Charged With Misdemeanors Per *Argersinger* But To Not Abide By *Lassiter* When Defendants Are Charged With Civil Contempt And Subject To Incarceration . . . 17

II. The Minority States Wrongly Assume That Indigent Civil Contemnors "Hold The Key To The Cell Door," Precluding Any Need For Counsel 19

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Adkins v. Adkins,
248 S.E.2d 646 (Ga. 1978) 17

Alabama v. Shelton,
535 U.S. 654 (2002). 9, 11, 12

Andrews v. Walton,
428 So.2d 663 (Fla. 1983) 14

Argersinger v. Hamlin,
407 U.S. 25 (1972) 9, 11, 17, 18, 20

Bowen v. Bowen,
471 So.2d 1274 (Fla. 1985) 14

Ensley v. Ensley,
238 S.E.2d 920 (Ga. 1977) 13

Florida v. Singletary,
549 So.2d 996 (Fla. 1989) 17

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 11

Gideon v. Wainwright,
372 U.S. 335 (1963) 11

Glover v. United States,
531 U.S. 198 (2001) 9

Gompers v. Buck's Stove & Range Co.,
221 U.S. 418 (1911) 19

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 11

In re Gault,
387 U.S. 1 (1967) 12

In re Nevitt,
117 F. 448 (8th Cir. 1902) 19

Johnson v. Zerbst,
304 U.S. 458 (1938) 11

Jones v. Wharton,
253 Ga. 82 (1984) 17

Lassiter v. Dep't of Soc. Servs.,
452 U.S. 18 (1981) 9, 10, 11, 12, 15, 17

Maine v. Goodine,
587 A.2d 228 (Me. 1991) 17

McBride v. McBride,
431 S.E.2d 14 (N.C. 1993) 20

Mead v. Batchlor,
460 N.W.2d 493 (Mich. 1990) 20

Miller v. Miller,
652 S.E.2d 754 (S.C. Ct. App. 2007) 12, 13

Pamela R. v. James N.,
884 N.Y.S.2d 323 (Fam. Ct. 2009) 18, 19

Poston v. Poston,
502 S.E.2d 86 (S.C. 1998) 13, 23

Powell v. Alabama,
287 U.S. 45 (1932). 6, 19, 20

Price v. Turner,
691 S.E.2d 470 (S.C. 2010). 12, 17, 19, 23

Ridgway v. Baker,
720 F.2d 1409 (5th Cir. 1983) 16, 20, 21

Scott v. Illinois,
440 U.S. 367 (1979) 11

Small v. Small,
413 A.2d 1318 (Me. 1980) 15

State v. Rau,
465 S.E.2d 370 (S.C. Ct. App. 1995) 17

Vitek v. Jones,
445 U.S. 480 (1980) 12

Walker v. McLain,
768 F.2d 1181 (10th Cir. 1985). 20

United States Constitution

Amend. VI. 9, 10, 11, 12, 17

Amend. XIV. 9, 11, 12

Statutes and Rules

Fla. Stat. § 27.51 (2010) 14

Fla. Stat. § 775.02 (2010) 14

Ga. Code Ann. § 15-6-8 (2010) 13

Maine R. Civ. P. 66 (2009) 14, 15

Maine R. Civ. P. 88 (2010) 15, n.3

Maine R. Crim. P. 44 (2010) 15, n.3

Maine Rev. Stat. § 1801 (2009) 15, n.3

Maine Rev. Stat. § 1802 (2009) 15, n.3

S.C. Code Ann. § 63-3-620 (2010) 12

Newspapers and Press Releases

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Reports

Report of Right to Counsel Committee, The Constitution Project, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (Apr. 2009), http://www.constitutionproject.org/manage/ file/139.pdf. 4

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Other

Samuel Johnson,
Idler Essay No. 22, Sept. 16, 1758. 22

INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. The Constitution Project achieves this goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest state courts, in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' general consent for *amicus curiae* to submit a brief in this proceeding are on file with the Court.

America's justice system.[2] Established in 2004, the

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[2] The Committee members are as follows (affiliations listed for identification purposes only): **Hon. Rhoda Billings** (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice, North Carolina Supreme Court, 1985-1986; Chief Justice, 1986; Judge, State District Court, 1968-1972; **Robert M. A. Johnson** (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; **Hon. Timothy K. Lewis** (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; **Hon. Walter Mondale** (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in favor of Gideon in *Gideon v. Wainwright*; **Hon. William S. Sessions** (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987; Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; **Shawn Marie Armbrust**, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; **Hon. Jay W. Burnett**, Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000; **Alan Crotzer**, Senior Clerk, Department of Juvenile Justice; 2006 DNA exoneree; **Dr.**

(Cont'd on following page)

Right to Counsel Committee's mission was to examine, across the country, whether criminal

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(Cont'd from preceding page)

Tony Fabelo, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; **Hon. Norman S. Fletcher**, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; **Monroe Freedman**, Professor of Law and Former Dean, Hofstra University School of Law; **Susan Herman**, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; **Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*; **Abe Krash**, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; **Charles J. Ogletree, Jr.**, Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; **Bryan Stevenson**, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; **Larry D. Thompson**, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; **Hubert Williams**, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; **Norman Lefstein** (Reporter and Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; **Robert Spangenberg** (Reporter), President, The Spangenberg Group.

defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of the United States Supreme Court, and rules of the legal profession, and to develop consensus recommendations for achieving lasting reforms.

The Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. The Committee's recommendations urged States to provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when States fail to comply with those requirements. The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. JUSTICE DENIED has been cited in a wide variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a wide array of public figures including U.S. Attorney General Eric Holder.

In 2010, due to concern over the imprisonment of indigent individuals as a result of non-criminal proceedings, the Right to Counsel Committee reconvened to issue a new recommendation to add to the existing recommendations in JUSTICE DENIED. Recognizing that a handful of states have created "*de facto* 'debtor's prisons' in which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the opportunity to be represented by counsel," the Right to Counsel Committee added the following recommendation to its seminal work: "Except in direct summary contempt proceedings, States should ensure that, in the absence of a valid waiver of counsel, quality representation is provided to all persons unable to afford counsel in proceedings that result in a loss of liberty regardless of whether the proceeding is denominated civil or criminal in nature." Report of Right to Counsel Committee, The Constitution Project, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (JUNE 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf.

SUMMARY OF ARGUMENT

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.
>
> *Powell v. Alabama*,
> 287 U.S. 45, 68-69 (1932)

This case calls for a narrow decision that will further elucidate the Court's prior pronouncements that in *any* proceeding resulting in the defendant's loss of liberty, the defendant is constitutionally entitled to be advised of the right to counsel and, if indigent, to have counsel appointed. A defendant should never be prevented from enjoying this fundamental constitutional protection simply because a proceeding is denominated as "civil." Indeed, the vast majority of States recognize the overarching principle that it is the loss of liberty that triggers the right to counsel, not the nature of the proceedings. Nevertheless, at least four States -- South Carolina, Florida, Georgia, and Maine -- do not recognize such a right despite the Court's pronouncements to the contrary, while a handful of others -- Nevada, New Hampshire, and New Mexico -- permit courts to decide the need for counsel on a

case by case basis. It is time to draw all of these States under the constitutional umbrella.

The Court should not be concerned that an express recognition of a defendant's right to counsel when his liberty interest is invoked will create a waterfall effect requiring counsel to be appointed to indigent defendants in every civil proceeding. Mr. Turner's petition asks the Court to respond to a discrete question that most States already recognize as a settled point of law: indigent defendants to a civil contempt charge must be appointed counsel when their liberty is jeopardized; to do otherwise, risks a defendant being jailed without due process.

The burden placed on civil defendants to prove their indigence coupled with their financial inability to "purge" the contempt by paying the court ordered amount often makes it impossible for indigent defendants in civil contempt proceedings to avoid serving sentences of as long as a year. Upon release, an indigent contemnor remains at risk of being re-arrested on a similar charge and returned to jail. This places indigent contemnors on a treadmill where they are unable to work because they are in jail, unable to purge their contempt because they are indigent, and unable to prove their indigence in the first instance because they are neither informed of a right to counsel nor provided court appointed counsel.

Mr. Turner's case is illustrative, although regrettably not unusual in the minority of states that have held defendants are not entitled to counsel in civil proceedings when their liberty is at stake.

His entire "evidentiary" hearing makes up three pages of the record. (Pet. App. D 16a-18a.) He spoke a total of 169 words at his hearing, 120 of which were intended as an explanation to the court of his inability to pay. (Pet. App. D 17a.) The court never advised Mr. Turner of his right to counsel nor did it give Mr. Turner any assistance beyond asking, "Is there anything you want to say?" (*Id.*) Even when Mr. Turner asked why he would not receive statutory work or good time credits during his incarceration, the court replied only, "Because that's my ruling." (*Id.*) Having received less than a minute of the court's time, Mr. Turner was incarcerated for one year in the Oconee County, South Carolina Detention Center for his "willful contempt." (*Id.*) In total, Mr. Turner was incarcerated at least three times for "willful contempt" related to his inability to pay -- and each time, the debt continued to increase while he was behind bars. (Pet. at 8.)

The fact that Mr. Turner and thousands like him are provided no constitutional due process protection is extraordinary given the Court's pronouncements to the contrary. Granting Mr. Turner's Petition for a Writ of Certiorari to the South Carolina Supreme Court will provide an opportunity to clarify once and for all that the risk of loss of liberty triggers a constitutional right to counsel no matter how the case is denominated.

ARGUMENT

I. The Court Has Already Recognized That Indigent Defendants In A Civil Action Have A Right To Appointed Counsel When Loss Of Liberty Is At Stake; It Should Therefore Grant The Petition And Reverse The South Carolina Supreme Court In Order To Resolve Any Confusion For Those States Failing To Apply That Standard

No more is needed here than a narrow decision clarifying to the States that the standard for a constitutional right to counsel is based not on whether the hearing is designated as "civil" or "criminal," but rather on whether the defendant's liberty interest is jeopardized.

The Court already recognized this standard in *Lassiter v. Department of Social Services*, where it set forth that it is "the defendant's interest in personal freedom, *and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal cases*, which triggers the right to appointed counsel." 452 U.S. 18, 26 (1981) (establishing that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel") (emphasis added). More recently, the Court emphasized that "no person may be imprisoned for *any offense* . . . unless he was represented by counsel at his trial." *Alabama v. Shelton*, 535 U.S. 654, 664-65 (2002) (emphasis in original) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) (recognizing that "any amount of actual jail time has Sixth Amendment significance").

The clarification that Mr. Turner seeks is a logical and needed extension of the Court's precedents in both the civil and criminal contexts, which the vast majority of States have already implemented. Only a minority of States, including South Carolina, continues to permit indigent defendants to be banished to modern day debtors' prisons under the pretext that the indigent have ready funds available to purge their contempt and unlock their cell doors. Under the Court's prior guidance, there can be no proper outcome other than that a defendant in any proceeding that results in loss of liberty (other than summary contempt proceedings) must be advised of his right to counsel and, if indigent, be appointed counsel unless the right is knowingly and intelligently waived, no matter whether the proceeding is "civil" or "criminal" in nature. Any other result is fundamentally unfair.

A. "Fundamental Fairness" Requires Counsel To Be Made Available Absent The Defendant's Specific Waiver Of The Right In Any Proceeding That Results In Loss Of Liberty

A long line of cases leads us to this moment. As the Court itself has stated, its precedents "speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel," which is "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 26-27.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal

prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." This right to counsel is recognized as a fundamental right of life and *liberty* extended to the States by the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property without due process of law"). *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936)); *see also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)). Under that standard, no indigent defendant whose liberty is at stake can be "assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. *See also Shelton*, 535 U.S. at 664-65 (recognizing the right to counsel before a suspended sentence may be imposed); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (recognizing the right to counsel if the trial leads to actual imprisonment); *Argersinger*, 407 U.S. at 37 (recognizing the right to counsel in any criminal prosecution "whether classified as petty, misdemeanor or felony" that actually leads to imprisonment, even if only briefly). *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 787-89 (1973) (denying a right to appointed counsel in revocation of probation proceedings).

The Sixth Amendment cases, such as those cited, have helped to inform the Court's decisions applying the right to counsel in civil matters as a fundamental due process right when a defendant's liberty interest is at stake. Indeed, the Court has said that it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the

phrase 'due process'" in cases invoking a defendant's liberty interest. *In re Gault*, 387 U.S. 1, 27-28 (1967) (recognizing a right to counsel for juveniles in delinquency proceedings); *see also Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (plurality) (recognizing a prisoner as having a due process right to counsel before he can be involuntarily sent to a psychiatric institution). In sum, the Court's decisions reveal that whether an individual case is decided under the Sixth Amendment for criminal matters (*e.g.*, *Shelton*) or the Due Process Clause for civil matters (*e.g.*, *Lassiter*), it is the defendant's liberty interest that is the universal standard for determining when a defendant has a constitutional right to counsel.

Mr. Turner's concerns were dismissed by the South Carolina Supreme Court under the rubric that this was civil contempt under which a defendant is not entitled to the "additional constitutional safeguards" that would have been Mr. Turner's had he been charged with criminal contempt. *Price v. Turner*, 691 S.E.2d 470, 472 (S.C. 2010) (describing Mr. Turner's twelve-month sentence as a "classic civil contempt sanction") (citing *Miller v. Miller*, 652 S.E.2d 754, 761 (S.C. Ct. App. 2007)). South Carolina does not distinguish between "civil" and "criminal" contempt under its statute with respect to potential penalties. S.C. Code Ann. § 63-3-620 (2010). The differentiation between "civil" and "criminal" in contempt proceedings, in practice, however, often favors criminal contemnors who are afforded a right to counsel, given the opportunity to present a true defense and, if found guilty, penalized a set period of time that is often far less than the time served by an indigent civil contemnor whose

sentence may be open-ended. *See, e.g., Poston v. Poston*, 502 S.E.2d 86, 89 (S.C. 1998) (discussing different burdens for civil and criminal contempt defendants); *Miller*, 652 S.E.2d at 761 (same).

In Georgia -- a minority state -- a criminal contemnor by statute may not be sentenced to more than 20 days. Ga. Code Ann. § 15-6-8 (2010), whereas a civil contemnor may be "imprisoned for an unspecified period" until he "performs a specified act." *Ensley v. Ensley*, 238 S.E.2d 920, 921-22 (Ga. 1977) (explaining that incarceration for criminal contempt is punitive, whereas incarceration for civil contempt is remedial).

The story of Georgia's Frank Hatley is a case in point. Jailed for more than a year for non-payment of child-support, Frank Hatley was released only after attorneys with the Southern Center for Human Rights ("SCHR") became involved. SCHR Press Release, *South Georgia Man Released from Year-Long Incarceration; Jailed For Being Too Poor To Support A Child That Is Not His* (July 15, 2009), http://www.schr.org/action/resources/falsepaternity; *see also* Bill Rankin, *Court knew man jailed for a year for non-support was not child's father*, Atlanta Journal Constitution, July 14, 2009, *available at* http://www.ajc.com/news/court-knew-man-jailed-91036.html. A paternity test in 2000 showed that Mr. Hatley was not the father of the child he had been helping to support for eleven years, yet the court continued to hold Mr. Hatley responsible for back payments. For the next eight years, Mr. Hatley paid. Then Mr. Hatley lost his job, lost his home, and moved into his car. Still, he attempted to make

payments. When his money ran out, the court stepped in and charged him with contempt. Without legal representation at his contempt hearing, Mr. Hatley was unable to show the court that his failure to pay was not willful but rather based on indigence. More than a year later, he was still incarcerated. At the time of Mr. Hatley's incarceration, 45 of the 140 inmates at the jail were also incarcerated for nonpayment of support. SCHR Press Release.

Other minority States similarly limit the right to counsel for defendants charged with civil contempt. Florida, for example, like South Carolina, statutorily limits jail sentences for civil and criminal contemnors to a period not to exceed twelve months. Fla. Stat. § 775.02 (2010); but by law, Florida's public defenders are required to represent indigent defendants charged with criminal contempt. Fla. Stat. § 27.51 (2010). No such law protects civil contemnors: because Florida requires a finding that the defendant has a "present ability to purge," it does not require counsel to be appointed. *Bowen v. Bowen*, 471 So.2d 1274, 1277 (Fla. 1985); *see also Andrews v. Walton*, 428 So.2d 663 (Fla. 1983) (determining that "fundamental fairness" prevents indigent contemnors from being imprisoned, therefore no counsel is needed).

Maine no longer distinguishes between "civil" and "criminal" contempt, but rather distinguishes its sanctions as "remedial" and "punitive." Maine R. Civ. P. 66 (2009). The Advisory Committee's Notes to Rule 66, however, clarify that a defendant subject to punitive sanctions is entitled to counsel, whereas a defendant subject to remedial sanctions is only

entitled to have counsel appointed if such a right is granted under another law since "there generally is no such right in civil proceedings." Maine R. Civ. P. 66, Advisory Committee's Notes ¶ 8 (June 1, 2000) (discussing Rule 66(d)(2)); Advisory Committee's Notes (June 1, 1997) (discussing Rule 66(c)). Effectively, this represents the status quo as existed pre-*Lassiter*. *See Small v. Small*, 413 A.2d 1318, 1323 (Me. 1980).[3] Like South Carolina, these States are in direct conflict with this Court's decisions requiring counsel to be provided when a defendant's liberty interest is at stake.

The minority States ignore the warning abided by the vast majority of States that have decided this issue, as articulated by the Court of Appeals for the Fifth Circuit, that no matter how a contempt case is

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[3] In 2009, Maine created a Commission on Indigent Legal Services "whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations." Maine Rev. Stat. § 1801 (2009). Effective July 1, 2010, Maine's Criminal Procedure Rule 44 governs any assignment of counsel to such a proceeding. *See* Maine R. Civ. P. 88; Maine R. Crim. P. 44A. Under the new law, counsel will be assigned to "an indigent party in a civil case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation." Maine Rev. Stat. § 1802(4)(B) (2009).

denominated, if the defendant's liberty is at stake, he is owed a right to counsel for one reason:

> If the court errs in its determination that the defendant has the means to comply with the court's order, the confinement may be indefinite. Such an error is more likely to occur if the defendant is denied counsel. Viewed in this light, a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled "criminal," with a correspondingly greater need for counsel.

Ridgway v. Baker, 720 F.2d 1409, 1414 (5th Cir. 1983) ("the line between civil and criminal contempt is rarely as clear as the state would have us believe").

A defendant's right to counsel in a civil proceeding when his liberty is at stake should not be dependent upon where he lives. By any measure, that is constitutionally deficient and fundamentally unfair.

B. It Is Illogical For The Minority States To Require Counsel For Defendants Charged With Misdemeanors Per *Argersinger* But To Not Abide By *Lassiter* When Defendants Are Charged With Civil Contempt And Subject To Incarceration

States that follow the minority view, including South Carolina, have acknowledged this Court's instruction in *Argersinger* regarding the Sixth Amendment right to counsel in cases where the defendant is charged with a misdemeanor. *See, e.g., State v. Rau*, 3465 S.E.2d 370 (S.C. Ct. App. 1995) (discussing *Argersinger* and describing "[o]ne of the most valued rights that a defendant can have" as "his Sixth Amendment right to assistance of counsel"); *Florida v. Singletary*, 549 So.2d 996, 997 (Fla. 1989) ("Any defendant who faces the possibility of incarceration must be provided the services of a lawyer if he cannot afford one. It is axiomatic that these services are deemed essential because of the lawyer's training and expertise."); *Jones v. Wharton*, 253 Ga. 82, 83 (1984) ("When an accused is placed on trial for any offense, whether felony or misdemeanor, for which he faces imprisonment, the constitutional guarantee of right to counsel attaches."); *Maine v. Goodine*, 587 A.2d 228, 229 (Me. 1991) ("an indigent defendant has the right to be represented by a lawyer"). Yet, they fail to recognize an equivalent concern for defendants in civil contempt cases. *See e.g., Turner*, 387 S.C. at 145 n.2 ("We recognize that in holding a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position."); *Adkins v. Adkins*, 248 S.E.2d 646 (Ga. 1978) ("A contempt for

failure to pay child support is a civil proceeding. Its primary purpose is to provide a remedy for the collection of child support by coercing compliance with such an order. *Argersinger* relates to criminal prosecutions and is not applicable."). It is unfathomable why these States decline to provide counsel to indigent defendants in civil contempt proceedings where incarceration is involved.

There is a fine line between whether an act is civil or criminal and "in many circumstances, a civil contempt may have more serious consequences than a criminal contempt." *Pamela K. v. James N.*, 884 N.Y.S.2d 323, 328 (Fam. Ct. 2009). A criminal contemnor, however, is provided a full panoply of protections, including the right to counsel, while a civil contemnor in the minority States stands alone.

The minority States place a double burden on a civil defendant charged with violating a court order to pay a debt or to pay child support. First, unlike criminal contempt cases where the government bears the burden of proof, the moving party in a civil contempt proceeding need only make a simple *prima facie* case and has no obligation to prove the defendant is actually capable of paying. Rather, once the existence of a court order and noncompliance is shown, the burden shifts to the defendant to prove his own inability to pay. Second, a civil defendant must (a) comprehend that he bears that burden, (b) prepare his defense, (c) navigate the court's procedural rules and customs, and (d) put on an evidentiary hearing -- usually without any legal education or related experience whatsoever. As the Court acknowledged almost 80 years ago,

indigent defendants are unlikely to have the ready skills available to mount such a defense without the benefit of counsel. *Powell*, 287 U.S. at 68-69.

South Carolina and the other minority States, as exemplified through Florida, Georgia, and Maine, have acknowledged the constitutional right of counsel for criminal defendants even when incarceration may only be for a brief period. Yet these same states refuse to protect indigent defendants charged with civil contempt facing indefinite incarceration if they are too poor to pay and are unable to put on an adequate defense without counsel. That is fundamentally unfair.

II. The Minority States Wrongly Assume That Indigent Civil Contemnors "Hold The Key To The Cell Door," Precluding Any Need For Counsel

It has become a common turn of phrase that incarceration for civil contempt is merely coercive -- and hence not requiring due process in the minority States -- rather than punitive, because civil contemnors "hold the key to the cell door," in that they can purge their contempt at any time. *Turner*, 691 S.E.2d at 472; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911) (he "carries the keys of his prison in his own pocket") (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)); *Pamela R.*, 884 N.Y.S.2d at 328 ("the best rule of thumb for distinguishing between criminal and civil contempts is that if the respondent 'holds the keys to the jail cell in his hands,' then it is a civil contempt"). Nothing could be further from the truth.

A civil contemnor who does not have the present ability to pay "does not have the 'keys to his jail'; what is nominally a civil contempt proceeding is in fact a criminal proceeding . . . the defendant is not being coerced, but punished." *Mead v. Batchlor*, 460 N.W.2d 493, 496 (Mich. 1990) (citation omitted); *see also Walker v. McLain*, 768 F.2d 1181, 1184 (10th Cir. 1985) (noting that if a contemnor is truly indigent, "his liberty interest is no more conditional than if he were serving a criminal sentence"); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993) ("the facts of the present case illustrate that trial courts do not always make such a determination [of the present ability to pay] prior to ordering the incarceration of a civil contemnor"). Despite indigence being a complete defense to a civil contempt charge, a defendant bears virtually the entire evidentiary burden without the skills or knowledge to master it. *Ridgway*, 720 F.2d at 1414 ("The indigent who appears without a lawyer can be charged neither with knowledge that he has such a burden nor with an understanding of how to satisfy it."). *See also Argersinger*, 407 U.S. 25 at 30 ("He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be . . . convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.") (quoting *Powell*, 287 U.S. at 68-69).

Amicus's Right to Counsel Committee spent four years investigating infirmities in the American judicial system regarding the constitutional right to counsel as applied, and supplemented its findings in 2010 due to a growing awareness that the minority States have created "*de facto* 'debtor's prisons' in

which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the opportunity to be represented by counsel." *See* The Constitution Project, Right to Counsel Committee, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (June 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf.

"Indigent" and "obdurate" are not synonymous terms. Even so, Mr. Turner and thousands like him have been incarcerated without any reasonable opportunity to mount a defense. Modern day debtor's prisons are being increasingly used to "coerce" indigent people who are unable to pay their debts. Because in recent years, courts have been more frequently called upon to assist in cases involving consumer debt, the concept of "debtors' prisons" lately has received much broader attention. *See, e.g.*, Editorial, *The New Debtors' Prisons*, N.Y. Times, Apr. 6, 2009, *available at* http://www.nytimes.com/2009/04/06/opinion/06mon4.html (calling the practice "barbaric and unconstitutional"); *see also* Chris Serres and Glenn Howatt, *In jail for being in debt*, Minneapolis Star Tribune, June 9, 2010, *available at* http://www.startribune.com/local/95692619.html (describing their analysis that in Minnesota, "the use of arrest warrants against debtors has jumped 60 percent over the past four years, with 845 cases in 2009"); Editorial, *People find themselves arrested -- and in jail -- because they owe money*, Las Vegas Sun, June 14, 2010, *available at* http://www.lasvegassun.com/news/2010/jun/14/de

btors prisons/ (calling for "an end to this despicable practice").

Florida, one of the minority States that do not recognize a right to counsel in civil contempt proceedings, has also "resurrected the *de facto* debtor's prison" and has jailed hundreds of people for failing to pay their debts. *See* Editorial, *Debtors' prison ... again*, St. Petersburg Times, Apr. 14, 2009, *available at* http://www.tampabay.com/opinion/editorials/article991963.ece.

In reality, *de facto* debtors' prisons existed for civil contemnors who were unable to pay long before the present economic difficulties in the United States made their concept interesting editorial copy. And they will continue to exist for as long as "poverty is punished among us as a crime." Samuel Johnson, Idler Essay No. 22, Sept. 16, 1758 (opining that poverty should be treated with the same lenity as other crimes; rather than leaving the debtor languishing in a debtor's prison, the onus must be on the creditor to prove the debtor's assets).

As Mr. Turner's case exemplifies, indigent defendants in the minority States have no right to appointed counsel, have no means of understanding how to put on a defense, and are vulnerable to making admissions against their own interests in court. Moreover, the proceedings are so streamlined that no true evidentiary hearing takes place to determine indigence. They are, in effect, punished for their poverty. Despite this, the South Carolina Supreme Court authorizes no "constitutional safeguards" for accused civil contemnors, explaining

the difference between "civil" and "criminal" contempt as follows:

> A contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do. This distinction between civil and criminal contempt is crucial because *criminal contempt triggers additional constitutional safeguards*.

Turner, 691 S.E.2d at 472 (citing *Poston*, 502 S.E.2d at 88 (emphasis added; internal citations omitted).

Mr. Turner deserved the right to counsel before spending a year in the South Oconee Detention Center. Civil contemnors only hold the keys to their cell doors when they have the present ability to purge their contempt. In many cases, indigent contemnors have neither resources to purge their contempt nor knowledge of the judicial system to prove their indigence. Their only choice is to languish in jail -- a 21st century form of debtors' prison -- until the passage of time allows for their release. This is punitive, not coercive, and the Court should take this opportunity to clarify that a defendant is entitled to counsel in any proceeding resulting in a loss of liberty without regard to whether the proceeding is denominated "civil" or "criminal."

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the South Carolina Supreme Court should be granted.

Dated: July 29, 2010

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AMICUS CURIAE BRIEF

167

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In the Supreme Court of the United States

MICHAEL D. TURNER, *Petitioner*,

v.

REBECCA PRICE AND SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, *Respondent*.

On Petition for a Writ of *Certiorari* to the Supreme Court of South Carolina

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRENNAN CENTER FOR JUSTICE, AND THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. EMPIRICAL EVIDENCE DEMONSTRATES THE NECESSITY OF PROVIDING COUNSEL TO INDIGENT DEFENDANTS IN CONTEMPT HEARINGS IN WHICH THEY FACE POTENTIAL INCARCERATION.....4

A. Indigent Contemnors Face Unique Obstacles Necessitating the Assistance of Counsel.....5

1. Alleged contemnors are frequently indigent.....6

2. Indigent contemnors lack the basic skills necessary to defend themselves in court.....7

B. Representation by Counsel is Necessary to Effectively Adjudicate a Contempt Proceeding.....9

1. The defense of a contempt charge is complex.....10

2. Significant evidence suggests that alleged contemnors frequently have inability-to-pay defenses.....13

3. Wrongfully incarcerating non-custodial parents who simply cannot pay does not serve the goals of contempt and visits serious and harmful consequences on the contemnor, his family, and the state. 15

4. Evidence demonstrates that the presence of counsel helps to ensure that only appropriately willful contemnors are deprived of their liberty and sentenced to jail. 18

II. THIS COURT SHOULD PROVIDE CLEAR GUIDANCE TO THE STATES THAT THE CONSTITUTION REQUIRES THE APPOINTMENT OF COUNSEL WHENEVER PERSONAL LIBERTY IS THREATENED. 22

TABLE OF AUTHORITIES

Page(s)

CASES

Cepeda v. Court of Common Pleas for the County of Berks,
No. 128 MM 2009 (Pa. 2010) 23

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283 A.2d 722 (Pa. Super. Ct. 1971) 22

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704 A.2d 612 (Pa. 1997) 22

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312 S.E.2d 504 (N.C. Ct. App. 1984) 12

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372 U.S. 335 (1963) 2, 5

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905 A.2d 233 (D.C. 2006) 10

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304 U.S. 458 (1938) 5

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452 U.S. 18 (1981) 22

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431 S.E.2d 14 (1993) 18

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646 P.2d 1240 (N.M. 1982) 12

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742 F.2d 262 (6th Cir. 1984) 16

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693 S.E.2d 240 (N.C. Ct. App. 2010) 12

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427 A.2d 928 (D.C. 1981) 11

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774 A.2d 1123 (Md. 2001) 16

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114 P.2d 737 (N.M. 1941) 11

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRENNAN CENTER FOR JUSTICE, AND THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 11,000 members nationwide – joined by ninety state, local, and international affiliate organizations with another 30,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America's criminal justice system.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. The parties were notified ten days prior to the filing of this brief of our intention to file and consent to file was obtained.

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its efforts to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Brennan Center's Access to Justice Project works to ensure that low-income individuals, families, and communities in this country are able to obtain effective legal representation.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation that seeks to secure equal justice by supporting excellence in the delivery of public defense and civil legal aid services to those who can not afford counsel. NLADA has approximately 700 program members, including nonprofit organizations, government agencies, and law firms, representing 12,000 lawyers. Created in 1911, NLADA is a recognized expert in public defense services and a leader in the development of national public defense standards.

Although NACDL, the Brennan Center, and NLADA (collectively the "amici curiae") all have different missions, all have a significant interest in guaranteeing – and urge this Court to consider – that indigents have a right to counsel in contempt hearings when they face imprisonment.

SUMMARY OF ARGUMENT

Indigent individuals who face imprisonment for nonpayment of child support lack the basic skills necessary to defend themselves against contempt charges. Such defendants face unique obstacles that make it difficult for them to represent themselves in court, such as under-education and lack of literacy skills.

Accordingly, for indigent alleged contemnors, representation by counsel is necessary to adjudicate a contempt hearing fairly and effectively. The burden is placed on alleged contemnors to show that they are unable to meet their child support obligations; however, the inability-to-pay defense is a complex one to present. The assistance of counsel is essential to establish that an indigent defendant's nonpayment was in fact not willful. Without ensuring that a contemnor actually has the ability to pay, the courts risk wrongful imprisonment and the creation of debtors' prisons.

Significant evidence suggests that alleged contemnors frequently have inability-to-pay defenses. In the absence of counsel, it appears that this defense often goes ignored. The imprisonment of these indigent defendants does not result in deterrence of future nonpayment, but does pose serious and harmful consequences to the contemnor, the contemnor's family, and the state.

The contrasting experiences of indigent contemnors who have counsel and those who do not demonstrate the necessity of counsel. For instance,

in North Carolina, where counsel is provided to indigent alleged contemnors facing incarceration, counsel is helpful to both the court and the contemnor, and ensures that only those who willfully have not paid support are sentenced to jail time.

This Court should provide clear guidance to the states through a constitutional rule stating that the appointment of counsel is required whenever a defendant's liberty is at stake, regardless of whether the hearing is technically categorized as "civil." While a substantial number of states provide counsel and thus would not be affected by such a decision, a clear ruling from this Court would bring uniformity to the enforcement of the right to counsel across the country.

In sum, amici curiae urge this Court to grant the petition for a writ of certiorari and reinforce the constitutional mandate that individuals should not face the threat of imprisonment without being provided the assistance of counsel.

ARGUMENT

I. EMPIRICAL EVIDENCE DEMONSTRATES THE NECESSITY OF PROVIDING COUNSEL TO INDIGENT DEFENDANTS IN CONTEMPT HEARINGS IN WHICH THEY FACE POTENTIAL INCARCERATION.

No indigent defendant should be unrepresented when his or her freedom is at stake. In the criminal context, this Court has recognized that indigent defendants facing the potential loss of

liberty need lawyers because of "the obvious truth that the average defendant does not have the professional legal skills to protect himself." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Thus, "any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

This Court should recognize what its precedents already implicitly acknowledge: our legal system's commitment to fairness and equal justice requires that indigent defendants have a right to appointed counsel at any contempt hearing at which they face loss of their liberty.

A. Indigent Contemnors Face Unique Obstacles Necessitating the Assistance of Counsel.

Most individuals do not have the skills to represent themselves successfully in a court of law. As this Court recognized long ago, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Johnson*, 304 U.S. at 462-63 (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself .... That which is simple, orderly and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious."). Indigent defendants are at an even

greater disadvantage when it comes to understanding the legal system and defending themselves.

1. Alleged contemnors are frequently indigent.

First, contemnors are frequently indigent. According to the federal Office of Child Support Enforcement, 70% of child support debt is owed by non-custodial parents with no quarterly income or with annual earnings of less than $10,000. *See* Office of Child Support Enforcement, Dep't of Health and Human Servs., *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 4 (July 2004). *See also* Rebecca May & Marguerite Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, Center for Family Policy & Practice 9 (Jan. 2005) (analyzing data on child support debtors). Only 4% of child support arrears are owed by non-custodial parents with annual incomes of more than $40,000. *Id.*

Indigent non-custodial parents, unfortunately, tend to remain indigent and therefore unable to meet their child support obligations. A primary reason for the continuing state of indigence is lack of employment opportunities. According to one study, low-income non-custodial fathers worked an average of less than thirty hours per week in 1998. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J. L. & Pub. Pol'y 95, 106 (2008).

These fathers earned an average of $4,221 annually. *Id.*

Another study found that in 1999, about half of indigent fathers were working at the time of the survey, while 92% of non-indigent fathers were working. Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Institute 6 (Apr. 2002), *available at* http://www.urban.org/UploadedPDF/410477.pdf ("Sorenson & Oliver"). This study also found that in addition to low levels of education, incarceration and lack of recent work experience, poor health conditions were also a significant obstacle to employment. *Id.* at 6-7. Over half of indigent non-resident fathers lacked health insurance. *Id.* at 9. Among the indigent non-custodial fathers who were not employed, half indicated that poor health was the reason for not working. *Id.* at 6-7.

Finding and maintaining employment in the current economy is especially challenging, and the last hired are the first fired. Without meaningful employment, indigent, non-custodial parents face significant challenges to meeting payment obligations.

2. Indigent contemnors lack the basic skills necessary to defend themselves in court.

Second, indigent contemnors are often under-educated and lack the necessary skills to represent themselves in court. Extensive research confirms

that indigent defendants in general tend to be among the least educated and least literate members of society. *See generally*, U.S. Dep't of Educ., *Literacy Behind Bars* 45 (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf ("Literacy Report").[2] For example, 63% of the state prison inmates whose personal income in the month before arrest was less than $1000 had failed to graduate from high school. *See* Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, *Education and Correctional Populations* 10 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf.[3]

Indigent parents with child support obligations are similarly disadvantaged relative to the general population. A 2002 study of fathers with child support obligations found that 41% of indigent fathers did not have a high school diploma – double the rate for those whose income was not below the poverty threshold. Furthermore, non-indigent fathers were three times as likely as indigent fathers to have attended school beyond twelfth grade. Sorenson & Oliver at 7; *see also* Patterson, *supra*, at 106.

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[2] The Literacy Report summarizes results from the 2003 National Assessment of Adult Literacy Survey. Literacy Report, *supra*, at iii. The survey examined three types of literacy: prose literacy, document literacy, and quantitative literacy. *Id.* at iv. For each literacy type, the survey grouped respondents into four literacy levels, including below basic, basic, intermediate, and proficient. *Id.*

[3] By contrast, only 18% of the general population has failed to complete high school. Sorenson & Oliver, *supra*, at 1.

Burdened with under-education and illiteracy, indigent defendants suffer from a lack of practical skills and abilities. For such an individual, understanding what a judge is asking and articulating his or her case persuasively is a nearly impossible task. Requiring indigent contemnors to proceed alone poses a serious threat to their right to be heard. Without legal counsel, indigent contemnors facing the threat of imprisonment are bereft of necessary procedural safeguards.

B. Representation by Counsel is Necessary to Effectively Adjudicate a Contempt Proceeding.

When a defendant is haled into court for failure to meet child support obligations, he or she often faces the risk of being found in contempt of a court order and being incarcerated as a result. Indigent defendants facing such incarceration are precisely the type of litigant for whom court-appointed counsel is necessary.

A normal contempt proceeding for failure to pay consists of many intricate steps, all of which present challenges for the layman. Litigants must spot issues, prioritize issues, develop facts and arguments, conform to the rules of evidence, obtain documents and testimony, and challenge the evidence presented by their opponents. All of these steps are difficult enough for trained attorneys to handle, to say nothing of uneducated laymen.

1. The defense of a contempt charge is complex.

To find a non-custodial parent in contempt of the court order setting forth child support obligations, the failure to pay must be willful. *See* S.C. Code Ann. § 63-3-620 (2009) ("An adult who willfully violates, neglects, or refuses to obey or perform a lawful order of the court ... may be proceeded against for contempt of court."); *see also* Patterson, *supra*, at 104-105. For a contempt finding to be appropriately applied, the alleged contemnor must have known about the court order and willfully disobeyed it. These safeguards are in place to prevent the incarceration of those who simply are unable to comply with the court order.

Willfulness, or intentionality, is a critical criterion for a finding of contempt. Without the component of willfulness, contempt charges would fall on all those who failed to meet their child support obligations, whether or not they were in fact able to make those payments. *See, e.g., In re Warner*, 905 A.2d 233, 243 (D.C. 2006) (Schwelb, J., concurring) (warning that unrestrained use of the contempt power in child support cases "present[s] a significant risk that a non-custodial parent will face imprisonment on account of poverty"). Only by ensuring that the failure to pay leading to contempt and imprisonment is something the contemnor could have prevented can we avoid the effective return to debtors' prisons.

The burden is on the alleged contemnor to prove that his or her noncompliance was not willful.

The basic rule, as set forth in state contempt statutes and elucidated by this Court in *United States v. Rylander* is that, after the state demonstrates noncompliance with a payment order, the contemnor may assert an inability to comply with the order in question as a defense, but the contemnor bears the burden of proof. 460 U.S. 752, 757 (1983). Providing sufficient proof to meet this burden can be very difficult for an indigent alleged contemnor trying to represent himself or herself.

Key to this analysis is the question of whether the defendant's inability to pay is caused by some voluntary action on the part of the defendant. *See, e.g., Smith v. Smith*, 427 A.2d 928, 931-32 (D.C. 1981) (in determining whether defendant was able to pay the child support debt owed, the trial court must consider all the circumstances of the case, "including whether the defendant's asserted inability to pay is due to involuntary financial straits or a voluntary decision to reduce his or her income").

Indeed, some courts have placed a heavy burden on non-custodial parents seeking to establish that their inability to pay child support was involuntary. For instance, the New Mexico Supreme Court has ruled that "[t]he duty rests upon appellant to exhaust his every reasonable resource .... It is not enough that he offer mere possible excuses for his failure to meet this obligation; he must offer good and reasonable ones." *Wilson v. Wilson*, 114 P.2d 737, 739 (N.M. 1941) (finding that because an unemployed and physically unfit father was still receiving rents from property, he failed to prove inability to pay his child support obligations). *See*

also Niemyjski v. Niemyjski, 646 P.2d 1240, 1241 (N.M. 1982) (finding sufficient evidence of financial ability to comply with support order where a father had used all of his funds for business and personal living expenses, stating that "it was bad judgment on his part and clearly a willful violation of his obligation .... [h]e ignored *his most important single obligation*, namely the support of his minor child"); *Shippen v. Shippen*, 693 S.E.2d 240, 243-4 (N.C. Ct. App. 2010) (basic finding of present ability to pay is minimally sufficient to defeat inability-to-pay defense; findings that defendant was able to work but voluntarily quit his job and refused to take another were also sufficient to establish willfulness); *Faught v. Faught*, 312 S.E.2d 504, 509 (N.C. Ct. App. 1984) ("[A] failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests himself or herself of assets or income after entry of the support order.").

Present lack of resources is often not sufficient in itself to establish the inability-to-pay defense. The courts frequently place a heavy burden on non-custodial parents to excuse themselves from their "most important single obligation" to provide child support. In the face of this heavy burden, a pro se defendant has little chance of prevailing on an inability-to-pay defense.

2. Significant evidence suggests that alleged contemnors frequently have inability-to-pay defenses.

The indigence and employment levels of alleged contemnors, as discussed above, strongly suggest that many of them are not able to meet their child support obligations. There is also evidence that support payments are frequently set beyond the ability of the non-custodial parent to pay. For example, a Department of Health and Human Services report issued in February 2002 stated that non-custodial parents with earnings below the poverty line were ordered to pay 69% of their reported earnings. *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 No. 1 Judges' J. 5, 5 (2004). *See also* Dep't of Health and Human Servs., Child Support for Children on TANF ii (2002), *available at* http://www.oig.hhs.gov/oei/reports/oei-05-99-00392.pdf. Federal law permits payments of only 50% to 65% of income. *See* Pearson, *supra*, at 5.

The inability of a defendant to meet his or her obligation would be the obvious defense to be raised in the context of a contempt proceeding for nonpayment of child support. Nevertheless, in the absence of counsel, it appears that the inability-to-pay defense often goes ignored. Large numbers of indigent contemnors are imprisoned for failure to meet child support obligations every year. There are no compiled statistics on the total number of Americans imprisoned for nonpayment of child support, yet "the limited existing data suggest that the number is substantial." Patterson, *supra* at 117.

For example, in 2003, experts estimated that in New Jersey, 300 persons were imprisoned without being provided counsel.[4] *See* May & Roulet, *supra*, at 29. A study of one county in New Mexico revealed that over a two-year period, 131 civil contemnors went to jail for nonpayment. *See* Michelle Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. Rev. 275, 277 (1984). That was in just one of 33 counties in New Mexico. In Indiana, a child support prosecutor estimated that between 1900 and 2700 individuals were jailed in civil contempt hearings for nonpayment in 2002. *See* May & Roulet, *supra*, at 20 (citing Ind. Child Custody and Support Advisory Comm., Meeting Minutes, Sept. 30, 2002, *available at* http://www.in.gov/legislative/interim/committee/2002/committees/minutes/CCSA59U.pdf). These levels of incarceration, combined with the unemployment and indigence data noted above, strongly suggest that large numbers of non-custodial parents are incarcerated not for willful failure to pay, but simply because they lack the ability to pay their support obligations.

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[4] In 2006, New Jersey changed its practice and now requires counsel to be appointed for indigent civil contemnors facing possible imprisonment. *See Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel).

3. Wrongfully incarcerating non-custodial parents who simply cannot pay does not serve the goals of contempt and visits serious and harmful consequences on the contemnor, his family, and the state.

Serious problems arise when indigent parents are wrongfully jailed for nonpayment of child support. The coercive imprisonment of indigent contemnors without evidence of willful nonpayment is counterproductive to the goals of child support enforcement – it is neither a just punishment nor is it an effective deterrent.

Sentencing indigent contemnors to imprisonment when they are simply unable to pay does not serve any coherent policy. Indeed, it can worsen the payment situation. It neither provides contemnors the means to fulfill their obligations, nor is it a deterrent for future nonpayment.

The New Jersey Supreme Court recently examined the case of three indigent contemnors who were sentenced to jail time. *Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel). The court observed at the outset that the three indigent contemnors in the case had not been helped at all by spending time in jail. *Id.* Anne Pasqua spent fifteen days in jail, was released without making any payment, and as of January 2003 still owed nearly $13,000. *Id.* Ray Tolbert spent seventy-one days in jail, was released without making a payment, and as of January 2003 still owed nearly $135,000 in child

support. *Id.* Michael Anthony spent twenty-four days in jail and was released after paying merely $125 towards his obligation of nearly $50,000. *Id.* at 667. As of January 2003, he remained unable to make his weekly $145 payments. *Id.* As these examples make clear, indigent contemnors often are imprisoned although they do not have the ability to pay because they have been unable to prove that defense without the assistance of counsel.

The improper imprisonment of an indigent contemnor also has serious effects on the contemnor's children, self, and family relationships. *See generally* Patterson, *supra*, at 126. The contemnor is often unable to generate income while in prison, thus preventing him or her from making any payments. *See, e.g., Peterson v. Roden*, 949 So. 2d 948, 950 (Ala. Civ. App. 2006) (noting that although work release programs are available, contemnors' participation may be ended for rule violations). The contemnor is also unable to provide any other sort of support or assistance to his or her children and often loses his or her job as a result of the imprisonment. *See, e.g., Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

When faced with the prospect of imprisonment, many parents "go underground" in an attempt to hide their income from child support enforcement agencies. Patterson, *supra*, at 126. Turning to the underground economy often worsens payment prospects by leading to criminal activity, exploitation by employers, and less stability and growth in future earnings. *See* Ann Cammett,

Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents, 13 Geo. J. Poverty L. & Pol'y 313, 327 (2006).

Most critically of all, the specter of imprisonment can damage the relationship between the indigent parent and his or her child. Imprisonment or "going underground" may sever the parent-child relationship and result in the lack of emotional and psychological benefits that children gain from their parental relationships. *See, e.g.*, Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health & Human Servs., *The Importance of Fathers in the Healthy Development of Children* 11-13 (2006), *available at* http://www.childwelfare.gov/pubs/usermanuals/fatherhood/fatherhood.pdf.

This sad state of affairs also imposes a substantial burden on the states. For example, imprisoning three thousand individuals costs the state of Indiana approximately $186,000 *per day*. *See* State Prison Expenditures, Bureau of Justice Statistics, Dep't of Justice, 1 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf. If the costs of imprisonment increase at the same rate as between 1986 and 2001, then in 2016 it will cost Indiana almost $280,000 per day to incarcerate these individuals.

In sum, the consequences of the wrongful imprisonment of indigent contemnors extend far beyond the prison term of the contemnor. The family, the children, and society all pay a price.

4. Evidence demonstrates that the presence of counsel helps to ensure that only appropriately willful contemnors are deprived of their liberty and sentenced to jail.

The experience in jurisdictions that provide counsel to alleged contemnors facing incarceration demonstrates that counsel is helpful to both the court and the contemnor, and ensures that only those who willfully have not paid support are sentenced to jail time. In North Carolina,[5] for example, alleged contemnors are represented through the Office of Indigent Defense Services, which has a Department of Parental Representation.[6] The office coordinates the provision of representation across the state, although the mechanisms through which counsel are provided and the contempt processes in each county differ. Training is offered to lawyers across the state on how to handle cases of alleged contempt, which addresses the law regarding willfulness and how to gather evidence of appropriate efforts to obtain or retain employment. The attorneys who represent alleged contemnors also have an active email list where they can ask each other questions and share helpful precedent.

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[5] In North Carolina, the right to counsel for contemnors facing incarceration was developed through case law. *See McBride v. McBride*, 431 S.E.2d 14 (N.C. 1993).

[6] The Department's web address is http://www.ncids.org/ChildSupport/ChildSupportHome.htm.

In Durham County, North Carolina, a contempt case for failure to pay begins with the issuance of an order to show cause why the individual should not be held in contempt, which must be supported by an affidavit setting forth a factual basis for the assertion that the failure to pay is willful. Counsel is assigned to indigent defendants at the first appearance after the issuance of an order to show cause. A pretrial conference is then scheduled for two to four weeks thereafter, giving counsel time to meet with the alleged contemnor and evaluate the case.

According to one Durham County public defender who represents alleged contemnors, the attorneys meet with their clients before the pretrial hearing to review work history, disability status, previous incarcerations, history of child support orders, pay history and ability to pay. She noted that the primary service an attorney provides in these cases is to help the client gather the relevant documentation and appropriate evidence, which generally concerns whether the failure to pay is willful. For example, she noted that she asks clients to document their job search by going back to places where they have applied, obtaining copies of their applications, and following up on their prospects. At the pretrial hearing, the attorneys often raise the issue of willfulness. They also raise procedural issues, including the existence of multiple or conflicting orders for support and any problems with the affidavit in support of the order to show cause.

Most cases are resolved at the pretrial hearing stage. If a case does proceed to an adversarial

hearing on the order to show cause, the hearing generally takes 10-20 minutes. Typically, the alleged contemnor will testify about his or her living situation, work history, job search, if applicable, and the explanations for unpaid support. Occasionally, where relevant, a case manager, probation officer or community support officer are called upon to testify. The opposing party does not generally offer evidence beyond the history of non-payment.

The public defender noted that, in this system, a very small percentage of alleged contemnors are incarcerated. A larger percentage of alleged contemnors are held in contempt, but the system is fairly effective at collecting arrearages from those who can pay. The system is also fairly effective at determining when the alleged contemnor's failure to pay was not willful and making appropriate adjustments to avoid unwarranted incarcerations.

In other counties, the process works differently, but the outcome appears to be similar. For example, a number of more rural North Carolina counties with fewer alleged contempt cases use a lawyer-for-the-day system. A number of orders to show cause are set for the same day. At the start of the proceeding, a general announcement is made about the alleged contemnors' right to counsel if they cannot afford to hire an attorney. The alleged contemnors are then given the option of requesting counsel or waiving their right to counsel. Those that exercise their right to counsel are assigned to a lawyer who is present and a recess is granted to permit the lawyer to speak the client and ascertain, initially, the issues in the particular case. Where

necessary, a hearing can be rescheduled to allow the attorney to gather more evidence.

Regardless of the type of system, there was considerable agreement that the presence of defense attorneys increases the efficiency of the system, by ensuring that only those issues relevant to failure to pay are raised during the contempt proceedings. A number of attorneys who represent alleged contemnors noted that their clients frequently want to focus on some other issue in the underlying case, such as the custody arrangement or what the other spouse did wrong. Without attorney assistance such clients would appear before the court with the intention of trying to change the issue in the contempt hearing. They likely would be unprepared to even address the issue of the willfulness of the failure to pay. By explaining the narrowness of the proceedings to their clients and focusing solely on the issues and evidence related to failure to pay and willfulness, the presence of defense attorneys streamlines the process, in addition to improving the accuracy of its outcomes.

When the process fails, the presence of counsel also ensures that the client knows about and can avail himself or herself of the right to appeal. The Office of Indigent Defense Services in North Carolina, for example, has a process for appointing attorneys to represent individuals who wish to appeal contempt orders. According to an attorney in that office, most often appeals are based on due process rights and the failure of the trial court to address evidence of whether the failure to pay was willful.

The North Carolina example demonstrates that the presence of attorneys increases efficiency and accuracy.

II. THIS COURT SHOULD PROVIDE CLEAR GUIDANCE TO THE STATES THAT THE CONSTITUTION REQUIRES THE APPOINTMENT OF COUNSEL WHENEVER PERSONAL LIBERTY IS THREATENED.

A substantial number of federal and state courts have ruled in favor of a right to counsel for indigent defendants in contempt proceedings where incarceration is a potential outcome.[7] But even in states where the law requires that counsel be provided to alleged contemnors facing incarceration, at times the mandate is not uniformly enforced.

For example, the Pennsylvania Supreme Court has ruled that there is a presumption that an indigent defendant is entitled to counsel in any proceeding where "he may be deprived of his physical liberty." *Commonwealth v. $9,847.00 U.S. Currency*, 704 A.2d 612, 615 (Pa. 1997) (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 26 (1981)). Likewise, the Pennsylvania Superior Court has explicitly recognized that an indigent contemnor facing imprisonment for nonpayment is entitled to the assistance of counsel. *See Commonwealth ex rel.*

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[7] We do not review these precedents here as they are covered in detail by the Petition for Writ of Certiorari. Pet. 12-19.

Brown v. Hendrick, 283 A.2d 722, 723-24 (Pa. Super. Ct. 1971).

Yet some indigent contemnors in Pennsylvania are not being provided with counsel when they face imprisonment for nonpayment. For example, in Berks County, eighteen individuals were denied access to counsel and were forced to petition the Pennsylvania Supreme Court for relief. *See* Application for Extraordinary Relief Under Pa. R.A.P. § 3309 and King's Bench Powers, *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010). The Pennsylvania Supreme Court recently denied the petition after the county agreed to provide counsel to all "present and future indigent litigants facing incarceration for nonpayment." *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010) (order denying relief). But lawyers for the petitioners noted that other counties in Pennsylvania fail to appoint counsel for such litigants and expressed concern that such practices may indeed be widespread. *See id.* at 2. Thus, even for those states that appear to provide counsel for indigent contemnors, the system sometimes fails.[8]

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[8] Over the years, despite the existence of clear precedent, this issue has come up in a number of Pennsylvania counties. While efforts to address it at the county level are sometimes successful, the litigation has not successfully addressed the recurrence of the issue in other locales. *See ACLU Applauds Pennsylvania Court Decision to Appoint Lawyers for Poor People Facing Prison*, June 9, 2004, *available at* http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/aclu-applauds-Pennsylvania-court-d

A ruling from this Court adopting a constitutional requirement that indigent defendants facing incarceration for contempt receive appointed counsel would not impose a heavy burden on the states. As demonstrated by the Petitioner, many states already have statutory or court-made rules that provide counsel to indigent contemnors facing imprisonment. Pet. 16-18. These states will be unaffected by a constitutional ruling from this Court. Such a ruling would result in changes only in the small minority of states that have rejected the right to counsel in this context or that have failed to enforce the right uniformly.

Even those states with the minority view would not be unduly burdened by a new constitutional rule, as they would have several options as to how to approach such a ruling from this Court. Most obviously, they could simply provide counsel as they do to criminal defendants. However, another option would be to take imprisonment off the table. If a court is not interested in imprisoning the contemnor, then counsel would not be required.

(*Cont'd*)
(describing the ACLU's success in getting one Pennsylvania county to change policy and provide lawyers in child support hearings, but noting that other counties still do not provide lawyers); Larry Lewis, *Montco Revises Policy at Prison*, Philadelphia Inquirer, Dec. 12, 2003 (same). Pennsylvania is not alone in this respect. There are narrative accounts of similar practices in other states where the precedents state the appointment of counsel is required. It is for this reason that a pronouncement by the United States Supreme Court on the constitutionally required process is necessary.

See Pasqua, 892 A.2d at 678 (noting that if counsel is not provided, then "incarceration may not be used as an option"). Different states can experiment differently, yet no individual will be sent to prison without the assistance of counsel.

While many states provide counsel and would not be affected, a clear ruling from this Court would help make uniform the enforcement of the right to counsel across the country. Wherever personal liberty is at stake, indigent defendants deserve court-appointed counsel, regardless of whether the hearing is technically categorized as "civil" or "criminal."

This Court has an obligation to ensure that the process by which these alleged contemnors are jailed complies with constitutional norms. Amici curiae respectfully request that the Court address this grave problem by implementing a constitutional rule to ensure that all indigent contemnors, in all states, are afforded the right to counsel in the face of potential incarceration. Such a solution would protect the rights of many of the most vulnerable without imposing an overwhelming burden on the states.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the petition for a writ of certiorari.

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JOINT APPENDIX

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MICHAEL D. TURNER,

Petitioner,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

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TABLE OF CONTENTS

Page

Docket Index for Case No. 2003 DR 37 472 (S.C. Fam. Ct.) 1a

Notice of Financial Responsibility and Paternity Determination dated Jan. 28, 2003 (filed S.C. Fam. Ct. June 18, 2003) 7a

Rule to Show Cause dated Aug. 20, 2003 (filed S.C. Fam. Ct. Aug. 25, 2003) 14a

Contempt Order (S.C. Fam. Ct. Sept. 17, 2003) 17a

Rule to Show Cause dated Feb. 3, 2004 (filed S.C. Fam. Ct. Feb. 3, 2004) 20a

Contempt Order (S.C. Fam. Ct. Feb. 18, 2004) 23a

Motion and Order to Direct Child Support Payments Through the Clerk of Court's Office to the Non-AFDC Recipient (filed S.C. Fam. Ct. Mar. 26, 2004) 26a

Rule to Show Cause dated Sept. 30, 2004 (filed S.C. Fam. Ct. Oct. 15, 2004) 28a

Contempt Order (S.C. Fam. Ct. Oct. 20, 2004) 31a

Contempt Order (S.C. Fam. Ct. Feb. 9, 2005) 33a

Rule to Show Cause (S.C. Fam. Ct. Aug. 17, 2005) 35a

Order to Issue Bench Warrant (S.C. Fam. Ct. Sept. 14, 2005) 38a

Hearing Transcript (S.C. Fam. Ct. Sept. 14, 2005) 40a

Contempt Order (S.C. Fam. Ct. Sept. 28, 2005) 47a

TABLE OF CONTENTS—Continued

Page

Rule to Show Cause dated Mar. 27, 2006 (filed S.C. Fam. Ct. Apr. 19, 2006) 49a

Order to Implement Wage Withholding (S.C. Fam. Ct. Apr. 19, 2006) 52a

Family Court History Report showing payment activity from Jan. 1, 2006 through July 6, 2006 ..... 56a

Order for Contempt of Court (S.C. Fam. Ct. Jan. 3, 2008) 60a

Letter from South Carolina Department of Social Services to Family Court requesting rule to show cause dated Jan. 3, 2008 (filed S.C. Fam. Ct. Jan. 8, 2008) 64a

Letter from Derek Enderlin to Clerk, South Carolina Court of Appeals filing Notice of Appeal and requesting fee waiver dated Jan. 24, 2008 (rec'd S.C. Ct. App. Jan. 25, 2008) 66a

Letter from South Carolina Office of the Attorney General to Clerk, South Carolina Court of Appeals dated Jan. 29, 2008 (rec'd S.C. Ct. App. Jan. 31, 2008) 68a

Letter from Derek Enderlin to Clerk, South Carolina Court of Appeals enclosing proposed appointment order dated Apr. 30, 2008 (rec'd S.C. Ct. App. May 1, 2008) 70a

TABLE OF CONTENTS—Continued

Page

Letter from South Carolina Office of the Attorney General to Derek Enderlin returning Appellant's Brief dated May 15, 2008 (rec'd S.C. Ct. App. May 16, 2008) 72a

Letter from Derek Enderlin to Clerk, South Carolina Court of Appeals dated June 12, 2008 (rec'd S.C. Ct. App. June 13, 2008) 73a

Letter from Clerk, South Carolina Court of Appeals to Derek Enderlin dated June 23, 2008 (rec'd S.C. Ct. App. July 11, 2008) 75a

Letter from Celia Robinson, South Carolina Commission on Indigent Defense to Clerk, South Carolina Court of Appeals dated Aug. 18, 2008 (rec'd S.C. Ct. App. Aug. 18, 2008) 76a

Cover Page of Final Brief of Appellant, South Carolina Court of Appeals, stamped "RECEIVED" Aug. 19, 2008 ..... 77a

Rule to Show Cause dated Mar. 4, 2009 (filed S.C. Fam. Ct. Mar. 23, 2009) 78a

Order to Issue Bench Warrant (S.C. Fam. Ct. Apr. 10, 2009) 81a

Order for Contempt of Court (S.C. Fam. Ct. Apr. 29, 2009) 85a

Hearing Transcript (S.C. Fam. Ct. Apr. 29, 2009) 89a

Motion and Order to Change Payee (filed S.C. Fam. Ct. May 26, 2009) 92a

TABLE OF CONTENTS—Continued

Page

Rule to Show Cause dated Aug. 7, 2009 (filed S.C. Fam. Ct. Sept. 21, 2009) 94a

Order certifying review (S.C. Sept. 28, 2009) 97a

Rule to Show Cause dated May 26, 2010 (filed S.C. Fam. Ct. May 26, 2010) 98a

Motion and Order to Change Payee (filed S.C. Fam. Ct. Sept. 22, 2010) 101a

Family Court History Report showing payment activity through Dec. 9, 2010 ..... 103a

APPENDIX

DOCKET INDEX

[STAMP: A TRUE COPY
DEC 9 2010
CLERK OF COURT—OCONEE COUNTY]

(THURSDAY) FAMILY COURT 12/09/10

----------POST PAYMENTS----------

ENTER FUNCTION====> OPER: LAST PYMT DATE: 05/05/2008
TRANS TYPE ====> SOURCE: NC

CURR AMOUNT ====>		CURRENT PYMT.....	51.73
CURR FEE ====>		CURRENT FEE.....	2.59
ARR AMOUNT ====>		ARREARS PYMT.....	20.00
ARR FEE ====>		ARREARS FEE.....	1.00
EXP AMOUNT ====>		----------	
TOTAL ====>		TOTAL PYMT DUE..	75.32
TOTAL RECEIVED====>		CHANGE ====>	
DTE OF COLLECTION=>		CHECK NUMBER	
CASE ID ====>	20030472	DSS IND.....	Y

.....DUE FROM.....		CURRENT DUE.....	12685.89
NAME...TURNER, MICHAEL D.		CURR FEE DUE....	644.07
.....PLAINTIFF.....		ARREARS DUE....	394.59
NAME...DSS-STATE		ARR FEE DUE.....	90.17
.....PAY TO.....		----------	
NAME...SC DSS		TOTAL DUE.....	13814.72
ADDRESS...P.O. BOX 195		ARR BAL.....	394.59
CITY/ST/ZIP...		ARR FEE BAL.....	90.17
WESTMINSTER, SC 29693			
NOTES:		ACCT-BAL.....	13814.72

(THURSDAY) CLERK OF COURT INDEXING 12/09/10
ADD/UPDATE HISTORY A150
ENTER FUNCTION..

CASE ID.. STATUS... E
2003DR3700472 DEFENDANT...TURNER, MICHAEL D.
FILED....06/18/2003 PLAINTIFF...DSS-STATE DELETED.. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FIL]ED. 06/18/2003
NOTICE FIN RESPON/INFO
SHEET
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FILED.] 06/18/2003
AFF SERVICE/GENETIC TEST
RESUL[TS]
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FILED.] 06/18/2003
NOTICE CONTIN/CS WORKSHEET
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. DATE FILED. 06/18/2003
ADMIN ORDER
STATUS NOTES..... DELETED.. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. DATE FILED. 06/19/2003
CASE CLOSED
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFE[NDANT].. W/WTH-MCGUFFIN'S AUTO SERVICE	[DATE FIL]ED.	08/14/2003
DOCUMENT BY PLAINTIFF..	DATE FILED.	00/00/0000
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF].. RTSC(CS)	DATE FILED.	08/25/2003
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF].. AFF OF SER(CS)	DATE FILED.	09/04/2003
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF].. ORDER(CS)	DATE FILED.	09/17/2003
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF].. CERTIFIED CARD AND LETTER	[DATE] FILED.	10/06/2003
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF].. ORDER (CS)	DATE FILED.	02/18/2004
STATUS NOTES.....	DELETED.	N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FILE]D. 02/18/2004
W/WTH WEAVER'S BRAKE
SERVICE
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BYPLAIN[TIFF].. [DATE FILE]D. 03/26/2004
MOTION & ORDER TO
REDIRECT (CS)
STATUS NOTES..... DELETED. N
PMTS TO NON AFDC

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE] FILED. 08/26/2004
TERM BROOK'S TIRE
SERVICE
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED 00/00/0000
DOCUMENT BY PLAIN[TIFF].. DATE FILED. 10/20/2004
ORDER (CS)
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. DATE FILED 10/26/2004
ORDER OF DISCHARGE
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. DATE FILED. 02/09/2005
ORDER (CS)
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF]..	DATE FILED.	09/14/2005
ORDER-CS		
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF]..	DATE FILED.	09/16/2005
BENCH WARRANT-CS		
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF]..	DATE FILED.	09/28/2005
ORDER-CS		
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF]..	DATE FILED.	07/07/2006
BENCH WARRANT-CS		
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF]..	[DAT]E FILED.	01/03/2008
ORDER-CS LIEN ON SS CLAIM		
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFE[NDANT]..	[DATE] FILED.	01/26/2008
NOTICE OF APPEAL BY DERRICK ENDERLIN (PUBLIC DEF)	DATE FILED.	01/26/2008
DOCUMENT BY PLAIN[TIFF]..		
STATUS NOTES.....	DELETED.	N
DOCUMENT BY DEFENDANT..	DATE FILED.	00/00/0000
DOCUMENT BY PLAIN[TIFF]..	DATE FILED.	04/10/2009
BENCH WARRANT-CS		
STATUS NOTES.....	DELETED.	N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. DATE FILED. 04/29/2009
ORDER-CS
STATUS NOTES DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FILED]. 05/27/2009
MOTION/ORDER/CHANGE
PAYEE(CS)
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FIL]ED. 04/15/2010
APPEAL/DENIED/NOT
SUBJECT TO
STATUS NOTES..... DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE FIL]ED. 04/15/2010
COURT APPT ATTY FOR
WILLFUL
STATUS NOTES..... DELETED.. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE F]ILED. 04/20/2010
CONTEMPT/FAILURE TO PAY CS
STATUS NOTES DELETED. N

DOCUMENT BY DEFENDANT.. DATE FILED. 00/00/0000
DOCUMENT BY PLAIN[TIFF].. [DATE F]ILED. 09/27/2010
MTN/ORDER/CHANGE PAYEE/CS
STATUS NOTES..... DELETED. N

CCL-0001 HISTORY NOT FOUND - OKAY TO ADD

SOUTH CAROLINA DEPARTMENT
OF SOCIAL SERVICES
CHILD SUPPORT ENFORCEMENT DIVISION

ADMINISTRATIVE PROCESS

COUNTY OF OCONEE
DOCKET NO. 2003-DR-37-472
CSED CASE NUMBER 0482527

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2003 JUN 18 P 12:37]

[LARGE STAMP: IV-D]

NOTICE OF FINANCIAL RESPONSIBILITY AND PATERNITY DETERMINATION*

TO:	EMPLOYER:
MICHAEL D. TURNER	CAPE CONSTRUCTION REALTY CO
[REDACTED]	[REDACTED]

The Child Support Enforcement Division (Division), pursuant to S.C. Code Ann. Section 20-7-9505 et seq., notifies you that:

1. You are the natural father of and have a duty to support and provide for the medical needs of the following child(ren):

B.L.P. DOB: XX/XX/1996

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

born to Rebecca L. Price and in the custody of Rebecca L. Price.

2. You are required to appear on May 14, 2003, at 11:00 AM for a negotiation conference to determine the amount of your duty of support. The negotiation conference will be held at: Oconee County Family Court, Oconee County Courthouse, Walhalla, SC.

3. You may assert the following objections in the negotiation conference:

A. You are not the parent of the dependent child(ren);

B. The dependent child(ren) was/were adopted by a person other than you;

C. The dependent child(ren) is/are emancipated; or

D. There is an existing court or administrative order for child support.

4. You may file a written denial of paternity with the Division within thirty (30) days after service of this Notice of Financial Responsibility and Paternity Determination. If you fail to timely deny this allegation of paternity, the question of paternity may be resolved against you without further notice.

5. If you timely deny the allegation of paternity:

A. You are subject to compulsory genetic testing and the expenses incurred for such tests may be assessed against you;

B. A genetic test may result in a presumption of paternity;

C. Upon receipt of the genetic test results, if you continue to deny paternity, you may request that the Division refer the matter to family court for a determination of paternity pursuant to S.C. Code Ann. Section 20-7-9540. An order for child support resulting from a subsequent finding of paternity is effective from the date you were served with this Notice of Financial Responsibility and Paternity Determination.

6. If such objections are not resolved at the negotiation conference, the Division will schedule a court hearing. A Notice of Hearing indicating the date, time and place will be provided to you.

7. The Division will establish all child support orders in accordance with the child support guidelines in S.C. Code Ann. Regs. 114-4710 through 114-4750, based on the parties' income. The Division may issue an administrative subpoena to obtain income information from you, or it may rely on wage statements, wage information from the Employment Security Commission, tax records and verified statements from the custodian. In the absence of such information, the Division will impute income based upon the child support guidelines.

8. The Division will establish an order for the provision of major medical health insurance, in accordance with the child support guidelines.

9. Costs of collection (service of process, genetic test costs, certified mail, and other court costs) may be collected from you.

10. The Division shall issue an order of default setting forth a determination of paternity and the amount of your duty of support if the following occurs:

A. You fail to send the Division a timely written denial of paternity; or

B. You fail to appear for the negotiation conference scheduled above; or

C. You fail to reschedule the negotiation conference prior to the date and time stated in this notice; or

D. You fail to send the Division a written request for a court hearing before the time scheduled for the negotiation conference; or

E. You fail to appear for a rescheduled negotiation conference; or

F. You fail to take or appear for a scheduled genetic test; or

G. The genetic test results show a 95% or greater probability that you are the father of the child(ren); and

1. You fail to appear for a subsequent negotiation conference; and

2. You fail to reschedule the subsequent negotiation conference prior to the date and time stated in the notice.

11. If an order of default establishing paternity and financial responsibility is issued, it shall be filed with the clerk of court in Oconee County.

12. When filed, the order of default has all the force, effect and remedies available for enforcement (for example, wage assignment, contempt, tax intercept or license revocation) as an order of the court.

13. No judgment is required to certify past-due child support to the Internal Revenue Service or State De-

partment of Revenue for purposes of intercepting federal or state tax refunds.

14. You must notify the Division of any change of address or employment within ten (10) days following such change.

15. An order issued pursuant to S.C. Code Ann. Section 20-7-9505 et seq., or an existing order of the court or any other administrative order may be modified under S.C. Code Ann. Section 20-7-9505 et seq. in accordance with the Uniform Interstate Family Support Act, S.C. Code Ann. Section 20-7-960 et seq.

16. You may request a court hearing within thirty (30) days after the receipt of the Notice of Financial Responsibility and Paternity Determination. The request must be served upon the authorized designee for the Division, whose name and address is listed below. The request must be served by certified mail or in the same manner as a summons in a civil action.

17. If you have questions, you should telephone or visit the Division at the address below.

18. You have the right to consult an attorney and be represented by an attorney at the negotiation conference.

Dated: Jan. 28, 2003 /s/ Sadie Stansell
Authorized Designee for the
Child Support Enforcement Division

Greenville Regional Office
Post Office Box 17799
Greenville, SC, 29607
(864) 241-1101

syc: 0482527

South Carolina Department of Social Services
Defendant Information Sheet*
COMPLETE THIS INFORMATION ON THE NON-SUPPORTING PARENT (DEFENDANT)

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2003 JUN 18 P 12:37]

File#: 0482527 Docket No.: 2003-DR-37-472 syc

NAME: MICHAEL D. TURNER		SSN: XXX-XX-XXXX
ALIAS/NICKNAME:	RACE: White	SEX: MALE
DOB: XX/XX/1977	WEIGHT: 160	HAIR COLOR: Brown
HEIGHT: 5 FT. 09 IN	SCARS:	
EYE COLOR: Blue		

Defendant's Complete Address:

[REDACTED]

[REDACTED]

County: Oconee Telephone No:

Specific directions to Defendant's home (include road, street names, and landmarks). Designate Defendant's home as an apartment, house, duplex, or trailer and give a description of it:

Last Known Employer: CAPE CONSTRUCTION REALTY CO

---

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

Employer's Complete Address:

[REDACTED]

Shift or Hours Worked:

Police Record: Date of Arrest:
Arrest Place:
Offense:
Place of Incarceration:

Closest Relatives' Names, Relationships, and Addresses:

MOTHER Margie Turner
[REDACTED]
[REDACTED]

Other Identifying/Locate Information:

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2003 AUG 25 A 9:41]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

* Original form completed by typewriter and by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY SEPTEMBER 17, 2003 AT 02:00 PM, TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ S Smith
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

08/20/2003

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 543.19 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 08/20/2003 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ S Smith
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
20TH DAY OF AUG

/s/ [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 08/11/08

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT–PERSONALLY
( ) _____; A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

ON THE _____ DAY OF _____, _____.

_____
DEPUTY SHERIFF –
OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
___ DAY OF _____, _____

_____
NOTARY PUBLIC FOR
SOUTH CAROLINA

TURNER, MICHAEL D.
20030472
08/20/2003 CRT DATE 09/17/2003
482527 GROUP CD: D

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

SC DSS/ Rebecca Price
Plaintiff

vs.

Michael D. Turner
Defendant

Support No. 2003-DR-37-472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2003 SEP 17 P 3:57]

ORDER*

Pursuant to Rule issued and duly served, this matter came before me for hearing on September 17, 2003. From the records of the Court, I find that the Defendant has willfully violated the Order of this Court requiring support payments and has failed to show just cause or excuse for this failure. I further find the Defendant to be in arrears in the amount of $595.70 / 760.47.

I further find that the Defendant's present income situation is:

* Original form completed by typewriter and by hand.

New Job - McGuffin's Auto

Therefore, I find the Defendant to be in contempt of Court and IT IS HEREBY ORDERED that the Defendant be confined to the county jail for a period of 90 days/months suspended upon the following conditions:

- ☑ Payment of Court Costs in the amount of $50.00, on or before October 17, 2003.
- ☐ Payment of $_____ plus 3% on arrearage making a total of $_____ on or before _____
- ☐ That the Defendant shall continue payments as previously ordered.
- ☐ That in addition to the above the Defendant shall pay the sum of $_____ (plus 3% Court Cost) per _____ to apply against arrearage, commencing on _____, in addition to any previously ordered payments.

  Court Cost) per _____ to apply against arrearage, commencing on _____, in addition to any previously ordered payments.
- ☑ Special conditions Zero balance on or before October 17, 2003. No credit for good/work time.

As to arrearage shown above, IT IS HEREBY ORDERED that same be:

- ☐ Held in abeyance until further Order of this Court.
- ☐ Reduced to $_____.

- ❑ Stricken from the records of this Court.
- ❑ Paid on as above outlined.

BE IT SO ORDERED /s/ [illegible]

JUDGE, FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina
September 17, 2003
TOTAL $ _____

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2004 FEB 3 P 2:24]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

---

* Original form completed by typewriter and by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY FEBRUARY 18, 2004 AT 02:00 PM, TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ S Smith
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

02/03/2004

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 691.30 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 02/03/2004 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ S Smith
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
2ND DAY OF FEB

/s/ Donna M. Armstrong
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 04/13/09

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT–PERSONALLY
( ) _____ A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

ON THE ____ DAY OF _____, _____

_____
DEPUTY SHERIFF –
OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
___ DAY OF _____, _____

_____
NOTARY PUBLIC FOR
SOUTH CAROLINA

TURNER, MICHAEL D.
20030472
02/03/2004 CRT DATE 02/18/2004
482527 GROUP CD: D

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

SC DSS/ For Rebecca Price-*present*
Plaintiff

vs.

Michael D. Turner-*present*
Defendant

Support No. 2003-Dr-37-472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2004 FEB 18 P 3:59]

ORDER*

Pursuant to Rule issued and duly served, this matter came before me for hearing on February 18, 2004. From the records of the Court, I find that the Defendant has willfully violated the Order of this Court requiring support payments and has failed to show just cause or excuse for this failure. I further find the Defendant to be in arrears in the amount of $340.67 / 389.94.

I further find that the Defendant's present income situation is:

* Original form completed by typewriter and by hand.

Wks. Weaver's Brake Service - Seneca [REDACTED]

Therefore, I find the Defendant to be in contempt of Court and IT IS HEREBY ORDERED that the Defendant be confined to the county jail for a period of 90 days/months suspended upon the following conditions:

- ☐ Payment of Court Costs in the amount of $50.00, on or before release. _____.
- ☑ Payment of $340.67 total plus [illegible]% on arrearage making a total of $_____ on or before release.
- ☐ That the Defendant shall continue payments as previously ordered.
- ☐ That in addition to the above the Defendant shall pay the sum of $_____ (plus 5% Court Cost) per _____ to apply against arrearage, commencing on _____, in addition to any previously ordered payments.
- ☐ Special conditions _____

As to arrearage shown above, IT IS HEREBY ORDERED that same be:

- ☐ Held in abeyance until further Order of this Court.
- ☐ Reduced to $_____.
- ☐ Stricken from the records of this Court.
- ☐ Paid on as above outlined.

BE IT SO ORDERED /s/ [illegible]

JUDGE, FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina
2-18, 04
TOTAL $ _____

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

SOUTH CAROLINA DEPARTMENT
OF SOCIAL SERVICES,
PLAINTIFF,

-VS-

MICHAEL D. TURNER,
DEFENDANT,

Docket No. 20030472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2004 MAR 26 P [illegible]]

[LARGE STAMP: IV-D]

MOTION AND ORDER*

TO REDIRECT CHILD SUPPORT PAYMENTS THROUGH THE CLERK OF COURT'S OFFICE TO THE NON-AFDC RECIPIENT

The Clerk of Court's Office currently sends Defendant's child support payments to the South Carolina

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

Department of Social Services. Since the Recipient closed her AFDC case effective July 01, 2003, Plaintiff moves to have the Clerk of Court send Defendant's on-going child support payment directly to the Recipient at the following address:

Rebecca L. Price
[REDACTED]

I SO MOVE:

Mar 11, 2004

/s/ Sanford E. Haley
Sanford E. Haley
Attorney for Plaintiff

ORDER

There being sufficient cause and no prejudice shown in this Motion, IT IS ORDERED that the Clerk of Court for Oconee County shall remit Defendant's on-going child support payments directly to the Recipient at the above address.

AND IT IS SO ORDERED.

/s/ [illegible]
Judge of the Family Court
Tenth Judicial Circuit

Walhalla, South Carolina
3/25, 2004

wbd: 0482527

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2004 OCT 15 P 2:49]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

* Original form completed by typewriter and by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY OCTOBER 20, 2004 AT 09:00 AM, TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ S Smith
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

09/30/2004

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 667.51 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 09/30/2004 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ S Smith
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
20TH DAY OF SEPT

/s/ Tonya [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 08/20/2009

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT–PERSONALLY
(✓) Mrs. Turner (wife), A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

ON THE 8 DAY OF, Oct., 2004.

/s/ [illegible]
DEPUTY SHERIFF –
OCONEE CO. CLERK OF COURT

SWORN TO ME THIS THE
8 DAY OF Oct., 2004

/s/ [illegible]
NOTARY PUBLIC FOR
SOUTH CAROLINA

TURNER, MICHAEL D.
20030472
09/30/2004 CRT DATE 10/20/2004
482527 GROUP CD: N
PTNR:DSS-STATE

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

PRICE, REBECCA
Plaintiff

vs.

TURNER, MICHAEL D.
Defendant

Support No. 2003-DR-37-472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2004 OCT 20 P 12:06]

ORDER*

Pursuant to Rule issued and duly served, this matter came before me for hearing on 10-20, 04. From the records of the Court, I find that the Defendant has willfully violated the Order of this Court requiring support payments and has failed to show just cause or excuse for this failure. I further find the Defendant to be in arrears in the amount of $830.47.

I further find that the Defendant's present income situation is:

Therefore, I find the Defendant to be in contempt of Court and IT IS HEREBY ORDERED that the De-

---

* Original form completed typewriter and by hand.

fendant be confined to the county jail for a period of 90 days/months suspended upon the following conditions:

- ❑ Payment of Court Costs in the amount of $_____, on or before_____, _____.
- ❑ Payment of $ balance plus 5% on arrearage making a total of $_____ on or before Release.
- ❑ That the Defendant shall continue payments as previously ordered.
- ❑ That in addition to the above the Defendant shall pay the sum of $_____ (plus 5% Court Cost) per _____ to apply against arrearage, commencing on _____, in addition to any previously ordered payments.
- ❑ Special conditions _____

As to arrearage shown above, IT IS HEREBY ORDERED that same be:

- ❑ Held in abeyance until further Order of this Court.
- ❑ Reduced to $_____.
- ❑ Stricken from the records of this Court.
- ❑ Paid on as above outlined.

BE IT SO ORDERED /s/ [illegible]
JUDGE, FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina
10-20-04
TOTAL $ _____

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

DSS-STATE *present*
Plaintiff

vs.

TURNER, MICHAEL D. *present*
Defendant

Support No. 2003-DR-37-472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2005 FEB 9 A 10:35]

[Pd 25.00
2/11/05]

ORDER*

Pursuant to Rule issued and duly served, this matter came before me for hearing on 2-9, 05 . From the records of the Court, I find that the Defendant has willfully violated the Order of this Court requiring support payments and has failed to show just cause or excuse for this failure. I further find the Defendant to be in arrears in the amount of $88.88.

I further find that the Defendant's present income situation is:

---

* Original form completed typewriter and by hand.

Therefore, I find the Defendant to be in contempt of Court and IT IS HEREBY ORDERED that the Defendant be confined to the county jail for a period of 90 days/months suspended upon the following conditions:

- ☐ Payment of Court Costs in the amount of $25.00, on or before 2-11, 05.
- ☒ Payment of $ Zero balance plus 5% on arrearage making a total of $_____ on or before Friday 2-11-05
- ☐ That the Defendant shall continue payments as previously ordered.
- ☐ That in addition to the above the Defendant shall pay the sum of $_____ (plus 5% Court Cost) per _____ to apply against arrearage, commencing on _____, in addition to any previously ordered payments.
- ☐ Special conditions _____

As to arrearage shown above, IT IS HEREBY ORDERED that same be:

- ☐ Held in abeyance until further Order of this Court.
- ☐ Reduced to $ _____.
- ☐ Stricken from the records of this Court.
- ☐ Paid on as above outlined.

BE IT SO ORDERED /s/ [illegible]
JUDGE, FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina
2-9, 05
TOTAL $ _____

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY SEPTEMBER 14, 2005 AT 09:00 AM, TO

---

* Original form completed by typewriter and by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ S Smith
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

08/17/2005

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 632.08 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 08/17/2005 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ S Smith
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
17TH DAY OF AUG

/s/ [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 08022009

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT-PERSONALLY

( ) _____, A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

ON THE _____ DAY OF _____, _____.

_____
DEPUTY SHERIFF –
OCONEE CO. CLERK OF COURT

SWORN TO ME THIS THE
___ DAY OF _____, _____.

_____
NOTARY PUBLIC FOR
SOUTH CAROLINA

TURNER, MICHAEL D.
20030472
08/17/2005 CRT DATE 09/14/2005
482527 GROUP CD: N
PTNR:DSS-STATE

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

DSS-STATE
Payee - present
Plaintiff

vs.

TURNER, MICHAEL D. - *not present*
Defendant

Support No. 2003-DR-37-472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2005 SEP 14 P 12:04]

ORDER*

Pursuant to Rule issued and duly served, this matter came before me for hearing on 9-14-05. From the records of the Court, I find that the Defendant has willfully violated the Order of this Court requiring support payments and has failed to show just cause or excuse for this failure. I further find the Defendant to be in arrears in the amount of $ 849.36

I further find that the Defendant's present income situation is:

Therefore, I find the Defendant to be in contempt of Court and IT IS HEREBY ORDERED that the De-

* Original form completed by typewriter and by hand

fendant be confined to the county jail for a period of ___ days/months suspended upon the following conditions:

- ☐ Payment of Court Costs in the amount of $_____, on or before _____,_____.
- ☐ Payment of $_____ plus 5% on arrearage making a total of $_____ on or before _____.
- ☐ That the Defendant shall continue payments as previously ordered.
- ☐ That in addition to the above the Defendant shall pay the sum of $_____ (plus 5% Court Cost) per _____ to apply against arrearage, commencing on _____, in addition to any previously ordered payments.
- ☑ Special conditions Issue Bench Warrant for Failure to Pay _____
  Notify Payee by phone if Def. arrested.

As to arrearage shown above, IT IS HEREBY ORDERED that same be:

- ☐ Held in abeyance until further Order of this Court.
- ☐ Reduced to $_____.
- ☐ Stricken from the records of this Court.
- ☐ Paid on as above outlined.

BE IT SO ORDERED /s/ [illegible]
JUDGE, FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina
9-14, 05
TOTAL $ _____

IN THE FAMILY COURT
CASE NO. 2003-DR-37-472

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

SOUTH CAROLINA DEPARTMENT OF
SOCIAL SERVICES/REBECCA PRICE,
Plaintiff,

versus

MICHAEL D. TURNER,
Defendant.

September 14, 2005
Walhalla, South Carolina

TRANSCRIPT OF RECORD*

BEFORE:

THE HONORABLE TIMOTHY M. CAIN, Judge

APPEARANCES:

JOHN E. CHAMBERS, JR., ESQUIRE
SC Department of Social Services,
Child Support Division
PO Box 17799
Greenville, SC 29602
Attorney for Plaintiff SCDSS

REBECCA PRICE, Plaintiff

---

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

MARY S. MANN
Court Reporter

THE COURT: We'll do this next case and take a short break.

CLERK: It will be number 46, sir.

THE COURT: Is---

CLERK: He is not present.

THE COURT: Okay. All right, Madam Clerk.

CLERK: Case 2003-DR-37-472, DSS State and Rebecca Price versus Michael D. Turner. The account balance is $849.36. His payments are $54.32. Those payments are due weekly. The last payment on the account was on 7/14/05 for $54.32.

THE COURT: Thank you. Ma'am, you are Rebecca Price?

MS. PRICE: Yes, sir.

THE COURT: The last address we have for Mr. Turner is [REDACTED]. Do you have any additional address?

MS. PRICE: No.

THE COURT: Mr. Darby wants to say something.

DEPUTY SHERIFF DARBY: Your Honor, I tried to serve him at that address, and I was advised that he was living somewhere in [REDACTED]. As a matter of fact, I turned the paper back in yesterday and it's written on it.

THE COURT: Okay. Do you know anything about that, ma'am?

MS. PRICE: Yes. That is his mother's address, and if you see the police records, he did get arrested the week that I got the papers to come to court for CDV and assault and battery, but he is now--he's been back. The day they let him out of jail he went to his mama's, and he went back that night to [REDACTED], and he's still there.

THE COURT: Okay.

MS. PRICE: But that is his mother's address.

THE COURT: But you think he's living on [REDACTED]?

MS. PRICE: Oh, yeah, he's still there.

THE COURT: How many children do you have with him?

MS. PRICE: Just one.

THE COURT: Does he visit the child?

MS. PRICE: No. He's not seen her since the day we started child support.

THE COURT: Do you know if he's working anywhere?

MS. PRICE: Yeah.

THE COURT: Where does he work?

MS. PRICE: He had--you have a copy of one. Then he works with a guy that subcontracts with Brian Ramey. But if you go to Brian Ramey, they wouldn't--he wouldn't take money for child support because he just subcontracts his boss man, and I don't know his name.

THE COURT: Okay.

MS. PRICE: But I do know, Your Honor, that the house that him and his wife live in it's his mother-in-law's, and the power and the phone is rigged from the mother-in-law's house, and they don't pay rent, and their power and stuff is connected up on to her house. So, I mean they have like the--you could go by there you can see that it's connected. So, I mean they don't--he don't have really any responsibility, and he just bought his black truck and their stationwagon. So, I mean---

THE COURT: Okay. Well, he's made no payment on this account since July 14, 2005, so I'm going to issue a bench warrant for his arrest, and if at some point you should get some information that he's working in a particular location or that you know he's home or anything like that--should she just call the Clerk's Office?

CLERK: Sheriff's Department.

THE COURT: Sheriff's Department.

MS. PRICE: He's home about six o'clock. His black truck or their stationwagon will be there at [REDACTED].

THE COURT: Okay. Well, if anybody can find him, Officer Darby will.

MS. PRICE: He was aware of the court date today because his mom got my little girl not this weekend but last weekend. They was aware of the court date.

THE COURT: Okay. Well, I'm going to issue an order to have him arrested whenever we can find him.

MS. PRICE: All right.

THE COURT: And do you want to be notified if he gets picked up?

MS. PRICE: Yes, please.

THE COURT: What's your phone number?

MS. PRICE: You can use my mom's. It's [REDACTED]. I don't have a home phone.

THE COURT: [REDACTED], and what's your mother's name?

MS. PRICE: Judy Price.

THE COURT: Okay. Now, they will make an attempt to call this number but if he gets picked up, sometimes we have to work those hearings in just when we can because we don't have any special time allotted. So, we'll try to make contact with you. You don't have a cell phone or a daytime phone number?

MS. PRICE: You can reach me at work.

THE COURT: Okay, what's---

MS. PRICE: [REDACTED]---

THE COURT: [REDACTED]?

MS. PRICE: ---[REDACTED].

THE COURT: [REDACTED]?

MS. PRICE: Extension [REDACTED].

THE COURT: Extension [REDACTED]? Where do you work?

MS. PRICE: At [REDACTED]. It's up here in Walhalla across from [REDACTED].

THE COURT: Okay. We'll do our best. Thank you for coming in.

MS. PRICE: May I ask what will be the sentence if he does--because I mean he is an habitual offender of not paying child support, and then he doesn't pay until

it's paid but I didn't know if you could do like a mandatory thirty days or sixty days.

THE COURT: Well, it would depend on the judge who will be presiding at that hearing.

MS. PRICE: Okay.

THE COURT: And that might be me or it might be another judge.

MS. PRICE: Okay.

THE COURT: So, I can't say what the sentence would be without hearing whatever excuse he might have.

MS. PRICE: Okay.

JUDY PRICE: Because when he gets in and gets back out, we usually following have phone calls.

MS. PRICE: Yeah, he harasses---

JUDY PRICE: He---

THE COURT: Okay, wait a minute. Wait a minute. I can't hear but one person at a time. This lady to my right has to take down every word that's said in this courtroom. So, ma'am, what is your name---

JUDY PRICE: The last time---

THE COURT: Listen to me.

JUDY PRICE: It's Judy Price.

THE COURT: Stand up for me. All right, Ms. Price, you're saying the last time he got out of jail he harassed you and bothered you?

JUDY PRICE: He bothered my husband and come to my house wanting to fight. He would follow me.

THE COURT: Okay, do you live in the city limits or out in the county?

JUDY PRICE: Outside. He lives in the city.

THE COURT: Well, if that happens, you need to contact the Sheriff's Department and the magistrate and get a warrant.

JUDY PRICE: Okay.

THE COURT: And that's what you need to do too, ma'am. All right, thank you.

---END OF RECORD---

CERTIFICATE

I, the undersigned Mary S. Mann, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record in the captioned case heard in the Family Court of Oconee County, Walhalla, South Carolina on September 14, 2005.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

/s/ Mary S. Mann

MARY S. MANN,
COURT REPORTER

June 17, 2010
Walhalla, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT

Rebecca L. Price - *present*
Plaintiff

vs.

Michael D. Turner - *present*
Defendant

Support No. 2003-DR-37-472

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2005 SEP 28 A 9:21]

ORDER*

Pursuant to Rule issued and duly served, this matter came before me for hearing on 9-28-05. From the records of the Court, I find that the Defendant has willfully violated the Order of this Court requiring support payments and has failed to show just cause or excuse for this failure. I further find the Defendant to be in arrears in the amount of $ 958.00

I further find that the Defendant's present income situation is:

In detention Tamassee Knob CarCare-Employer

Therefore, I find the Defendant to be in contempt of

* Original form completed by hand.

Court and IT IS HEREBY ORDERED that the Defendant be confined to the county jail for a period of 6 days/months suspended upon the following conditions:

☑ Payment of Court Costs in the amount of $75.00, on or before release.

☑ Payment of $_____ plus 5% on arrearage making a total of $ zero balance on or before release

☐ That the Defendant shall continue payments as previously ordered.

☑ That in addition to the above the Defendant shall pay the sum of $20.00 (plus 5% Court Cost) per wk to apply against arrearage, commencing on release, in addition to any previously ordered payments.

☒ Special conditions no work time credit.

As to arrearage shown above, IT IS HEREBY ORDERED that same be:

☐ Held in abeyance until further Order of this Court.
☐ Reduced to $_____.
☐ Stricken from the records of this Court.
☐ Paid on as above outlined.

BE IT SO ORDERED /s/ [illegible]
JUDGE, FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina
9-28-05
TOTAL $ _____

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2006 APR 19 P 2:19]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

---

* Original form completed by typewriter and by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY APRIL 19, 2006 AT 09:00 AM. TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ S Smith
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

03/27/2006 MUST BRING PROOF OF EMPLOYMENT

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE [illegible] BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 03/27/2006 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ S Smith
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
[illegible] DAY OF [ILLEGIBLE]

/s/ [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 08022009

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT–PERSONALLY
( ) _____, A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

ON THE ____ DAY OF _____, _____.

_____
DEPUTY SHERIFF –
OCONEE CO. CLERK OF COURT

SWORN TO ME THIS THE
___ DAY OF _____, _____

_____
NOTARY PUBLIC FOR
SOUTH CAROLINA

[BW ISSUED
7-7-06]

TURNER, MICHAEL D.
20030472
03/27/2006 CRT DATE 04/19/2006
482527 GROUP CD: N
PTNR:DSS-STATE

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

DSS-STATE
PLAINTIFF

vs.

MICHAEL D. TURNER
DEFENDANT

ORDER FOR CONTEMPT OF COURT*

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2006 APR 19 P 12:12]

FILE NO: 2003-DR-37-472
HEARING DATE 4-19-06
ATTY FOR PLAINTIFF
ATTY FOR DEFENDANT
JUDGE
COURT REPORTER
GUARDIAN AD LITEM

Pursuant to (Rule to Show Cause) (Bench Warrant), this matter was heard on the date shown above. Plaintiff (did) (did not) appear. Defendant (did) (did not) appear. I find the Defendant owes a support balance of $1094.28 as of the hearing date. I find that the Defen-

* Original form completed by typewriter and by hand.

dant's failure to make support payments when due (was) (was not) willful. My conclusions are based on the following facts:

( ) Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due.

( ) Defendant (has) (does not have) a physical or mental impairment which (prevents) (does not prevent) defendant from being gainfully employed.

(✓) Other: working @ John Painting Hwy 24 Anderson Co

Therefore, I find:

___ Defendant is not in contempt of this court.

___ Defendant is in contempt of court, and I order that Defendant be confined to the Oconee County Detention Center.

Defendant may purge himself/herself of contempt and be released from confinement by:

___ continue payments as previously ordered.

___ payment of fine of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of court costs related to this proceeding of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of $ _____ to the Oconee County Clerk of Court on or before _____ to apply against outstanding account balance.

___ _____

_____

Confinement shall commence

___ immediately

___ if fine, court costs, or payment to account balance is not made as ordered above

___ the entire period of confinement shall be served (no work time or good time credit to be given)

PROVIDED that the period of confinement shall not exceed one (1) year or _____

IT IS FURTHER ORDERED that Defendant shall:

___ pay the sum of $ ___ (plus 5% court costs) per _____ to apply against arrearages, commencing _____, in addition to previously ordered support payments

IT IS FURTHER ORDERED

___ enforcement of collection of the support arrearages shall be held in abeyance until further order of the Court.

✓ the Clerk of Court shall implement wage withholding immediately.

___ this order shall serve as a bench warrant for the arrest of above named defendant, with confinement until brought before the Court for a hearing.

___ defendant to be immediately released from Oconee County Detention Center

___ _____

_____

IT IS FURTHER ORDERED that at all times the parties shall advise the Clerk of Court of their current residence and mailing addresses, telephone numbers, and current employers.

Walhalla,
South Carolina

Dated: 4-19-06

/s/ Sallie C. Smith
~~PRESIDING JUDGE~~ Clerk of Court
THE FAMILY COURT OF THE TENTH
JUDICIAL CIRCUIT

FAMILY COURT HISTORY POSTED THRU 07/06/06

CASE NBR-20-030472

ACCT TYPE . . . .S
GROUP. . . . . .N
FREQUENCY . .W
STATUS. . . . . .

ORDER START DATE. 07/11/03
LAST BW ISSUE DATE . . .09/16/05
LAST DATE RULED IN . . .00/00/00

DEFENDANT
TURNER, MICHAEL D.
[REDACTED]
PHONE NUMBER IS MOTHER
SSN- [REDACTED]

PLAINTIFF
DSS-STATE
PAY TO
REBECCA L. PRICE
[REDACTED]

****

---STATUS---

PERIODIC PAYMENT

CUR PYMT...	51.73	CUR DUE.....	1104.73	CUR BAL.....	1160.04
ARR PYMT...	20.00	ARR DUE.....	964.00-	ARREARS BAL..	531.76
FEE.....	3.59	FEE DUE.....	77.31	----------	
	-------		---------	TOTAL ACT BAL	1691.80
TOT PYMT....	75.32	TOTL DUE...	218.04	ABEYANCE AMT.	.00

****

--A C T I V I T Y--
FROM 01/01/06 THRU 07/06/06

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	06/30/06	75.32		51.73	20.00	3.59	1691.80
C	06/23/06	75.32		51.73	20.00	3.59	1637.48
C	06/16/06	75.32		51.73	20.00	3.59	1583.16
C	06/09/06	75.32		51.73	20.00	3.59	1528.84
C	06/02/06	75.32		51.73	20.00	3.59	1474.52
C	05/26/06	75.32		51.73	20.00	3.59	1420.20
C	05/19/06	75.32		51.73	20.00	3.59	1365.88
C	05/12/06	75.32		51.73	20.00	3.59	1311.56
C	05/05/06	75.32		51.73	20.00	3.59	1257.24
C	04/28/06	75.32		51.73	20.00	3.59	1202.92
C	04/21/06	75.32		51.73	20.00	3.59	1148.60
C	04/14/06	75.32		51.73	20.00	3.59	1094.28
C	04/07/06	75.32		51.73	20.00	3.59	1039.96
C	03/31/06	75.32		51.73	20.00	3.59	985.64
C	03/24/06	75.32		51.73	20.00	3.59	931.32
D	03/22/06	FED-DSS CR	1404.00	.00	1404.00	.00	877.00
I	03/22/06	FED-INTCPT	1404.00	1404.00	.00	.00	2281.00
C	03/17/06	75.32		51.73	20.00	3.59	2281.00

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	03/10/06	75.32		51.73	20.00	3.59	2226.68
C	03/03/06	75.32		51.73	20.00	3.59	2172.36
I	02/28/06	STE-INTCPT	35.00	33.33	.00	1.67	2118.04
C	02/24/06	75.32		51.73	20.00	3.59	2153.04
C	02/17/06	75.32		51.73	20.00	3.59	2098.72
C	02/10/06	75.32		51.73	20.00	3.59	2044.40
C	02/03/06	75.32		51.73	20.00	3.59	1990.08
A	01/30/06	ALTER CASE		1843.35--	1843.35	.00	1935.76
C	01/27/06	54.32		51.73	.00	2.59	1935.76
C	01/20/06	54.32		51.73	.00	2.59	1881.44
C	01/13/06	54.32		51.73	.00	2.59	1827.12
C	01/06/06	54.32		51.73	.00	2.59	1772.80

END OF PAYMENT HISTORY

****

--HEARING DATA--

FROM 01/01/06 THRU 07/06/06

DATE	PRESIDING JUDGE	CURRENT PYMT		ARREARAGE BAL	TOT BAL	
		.00	.00	.00	.00	.00
05/05/06						
05/05/06	CALLED JOHN'S PAINTING TO GET ADDRESS AND TO SEE IF MR.					

DATE	PRESIDING JUDGE	CURRENT PYMT		ARREARAGE		TOT BAL BAL
05/05/06	TURNER IS WORKING THERE. TKF					
05/05/06	NO LUCK W/ANY INFORMATION					
04/20/06	X	.00	.00	.00	.00	.00
04/20/06	NEGOTIATION BY CLERKS OFFICE: W. WTH ORDERED. PAYOR IS					
04/20/06	CURRENTLY WORKING AT JOHN PAINTING ON HWY 24 IN ANDERSON.					

END OF HEARING HISTORY

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

Rebecca Price
PLAINTIFF

vs.

Michael D. Turner
DEFENDANT

ORDER FOR CONTEMPT OF COURT*

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 JAN 3 A 10:51]

FILE NO: 2003-DR-37-472
HEARING DATE 1/3/08
ATTY FOR PLAINTIFF
ATTY FOR DEFENDANT
JUDGE Cain
COURT REPORTER Lesa Williams
GUARDIAN AD LITEM

Pursuant to (Rule to Show Cause) (Bench Warrant), this matter was heard on the date shown above. Plaintiff (did) (did not) appear. Defendant (did) (did not) appear. I find the Defendant owes a support balance of $5728.76 as of the hearing date. I find that the Defen-

* Original form completed by hand.

dant's failure to make support payments when due (was) (was not) willful. My conclusions are based on the following facts:

( ) Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due.

( ) Defendant (has) (does not have) a physical or mental impairment which (prevents) (does not prevent) defendant from being gainfully employed.

( ) Other: _____

_____

_____

_____

Therefore, I find:

___ Defendant is not in contempt of this court.

___ Defendant is in contempt of court, and I order that Defendant be confined to the Oconee County Detention Center.

Defendant may purge himself/herself of contempt and be released from confinement by:

___ continue payments as previously ordered.

___ payment of fine of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of court costs related to this proceeding of $_____ to the Oconee County Clerk of Court on or before _____.

✓ payment of $ 0- Balance on acct to the Oconee County Clerk of Court on or before release to apply against outstanding account balance.

✓ Lien on any SS claim or SSI _____

Confinement shall commence

___ immediately

___ if fine, court costs, or payment to account balance is not made as ordered above

_✓_ the entire period of confinement shall be served (no work time or good time credit to be given)

PROVIDED that the period of confinement shall not exceed one (1) year or 12 mths

IT IS FURTHER ORDERED that Defendant shall:

___ pay the sum of $____ (plus 5% court costs) per _____ to apply against arrearages, commencing _____, in addition to previously ordered support payments

IT IS FURTHER ORDERED

___ enforcement of collection of the support arrearages shall be held in abeyance until further order of the Court.

___ the Clerk of Court shall implement wage withholding immediately.

___ this order shall serve as a bench warrant for the arrest of above named defendant, with confinement until brought before the Court for a hearing.

___ defendant to be immediately released from Oconee County Detention Center

_✓_ work release eligible

IT IS FURTHER ORDERED that at all times the parties shall advise the Clerk of Court of their current residence and mailing addresses, telephone numbers, and current employers.

Walhalla,
South Carolina

Dated: 1/3/08

/s/ [illegible signature]
PRESIDING JUDGE
THE FAMILY COURT OF THE TENTH
JUDICIAL CIRCUIT

[ON DSS LETTERHEAD] *

[FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 JAN 8 P 2:17]

January 3, 2008

Oconee County Family Court
P. O. Box 678
Walhalla, SC 29691

Your Number.: 2003-dr-472
Our Number: 0482527

Defendant: Michael D. Turner
Custodian: Rebecca L. Rogers

PLEASE NOTE THE PARAGRAPH(S) CHECKED BELOW:

( ) 1. Enclosed is a copy of an Order in the above action.

( ) 2. We are unable to serve Defendant. Please initiate locate activity.

( ) 3. Please initiate enforcement action and advise of action taken.

( ) 4. We have had no response to our correspondence. Date of last correspondence:

( ) 5. Please inform us of the status of this case.

---

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

( ) 6. The Non Custodial Parent is under Order to provide health insurance for his dependent(s). Enclosed please find an insurance verification form that needs to be completed and returned to our office.

(X) 7. Other:

THIS IS A UPDATED ADDRESS. PLEASE SCHEDULE A RULE.

--[REDACTED]

[HANDWRITTEN NOTE:
R/W Served
12/26/07
In OLEC
vm]

Please direct all future correspondence concerning this case to the undersigned at the above address. Also, please include our file number.

Sincerely,

/s/ Lola M. Alston
Lola M. Alston
Parent Locate Specialist

lma: 0482527

LETTER TO THE APPELLATE COURT CLERK FILING THE NOTICE OF APPEAL*

January 24, 2008

[STAMP: RECEIVED
JAN 25 2008
SC COURT OF APPEALS]

The Honorable Kenneth A. Richstad
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Rebecca Price, Respondent, v. Michael D. Turner,
Case No. 2003-DR-37-472

Dear Mr. Richstad:

Enclosed for filing is a notice of appeal in the above case. This matter concerns a jail sentence of twelve (12) months given to the Appellant for failure to pay child support. Please note that there is a similar action pending in the Supreme Court, Tony Strange v. the State of South Carolina, in which the Attorney General is representing the State. Because we believe the State is a necessary party, we are also serving the Attorney General. Also enclosed are the following:

(1) Proof of service of the notice of appeal on the respondent and the State of South Carolina.

(2) A copy of the order which is to be challenged on appeal.

---

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

(3) The defendant is challenging a jail sentence and is indigent and will be represented by the undersigned as well as the Office of Appellate Defense, therefore we would request a waiver of the one hundred dollar ($100.00) filing fee.

Sincerely,

/s/ Derek J. Enderlin
Derek J. Enderlin
Attorney for Defendant
Oconee Defender Corporation
Walhalla Courthouse
415 South Pine Street
Walhalla, SC 29691
864-638-3133
Fax: 638-3120

cc: Rebecca Price
[REDACTED]

Henry D. McMaster, Esquire
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Joseph L. Savitz, III Esquire
Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

[ON SOUTH CAROLINA
ATTORNEY GENERAL'S OFFICE
LETTERHEAD]

[STAMP: RECEIVED
JAN 31 2008
SC COURT OF APPEALS]

January 29, 2008

The Honorable Kenneth A. Richstad
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Rebecca Price v. Michael D. Turner

Dear Mr. Richstad:

I am in receipt of the Notice of Appeal and Proof of Service in the appeal listed above. I was served with a notice of appeal by Derek J. Enderlin of the Oconee Defender Corporation. Because this appears to be an appeal arising from a domestic matter between private litigants, this office will not be involved in the appeal.

By copy of this letter, I am so advising Mr. Enderlin and Joseph L. Savitz, III of the South Carolina Office of Appellate Defense.

Sincerely,

/s/ Salley W. Elliott
Salley W. Elliott
Assistant Deputy Attorney General

kws

cc: Derek J. Enderlin, Esquire
Joseph L. Savitz, III, Esquire
Rebecca Price

[ON ROSS AND ENDERLIN, PA'S LETTERHEAD]

[STAMP: RECEIVED
MAY 1, 2008
SC COURT OF APPEALS]

April 30, 2008

The Honorable Kenneth A. Richstad
Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Rebecca Price v. Michael R. Turner

Dear Mr. Richstad:

Enclosed please find a proposed appointment order for the above referenced case. If you need any additional information, please contact me.

Thank you for your kind attention to this matter.

Sincerely,

/s/ Derek J. Enderlin
Derek J. Enderlin

cc Joseph Savitz (VIA email)

enclosure

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Timothy M. Cain, Family Court Judge

REBECCA PRICE,
APPELLANT,

V.

MICHAEL R. TURNER,
RESPONDENT

[STAMP: RECEIVED
MAY 1 2008
SC COURT OF APPEALS]

APPOINTMENT ORDER

The above respondent has appealed a contempt sentence of twelve (12) months in family court. Derek J. Enderlin, as the Chief Public Defender of Oconee County, filed the notice of appeal and forwarded the case to the Office of Appellate Defense. Mr. Enderlin has since returned to private practice and is willing to be appointed on the case.

The Office of Appellate Defense does not normally represent individuals in contempt actions in family court. Therefore, Derek J. Enderlin will be appointed as counsel in the above referenced case and the Office of Appellate Defense will be associated for costs such as printing and other matters.

IT IS SO ORDERED

_____
Court of Appeals

_____, 2008

[ON SOUTH CAROLINA
ATTORNEY GENERAL'S OFFICE
LETTERHEAD]

[STAMP: RECEIVED
MAY 16 2008
SC COURT OF APPEALS]

May 15, 2008

Derek J. Enderlin, Esquire
Ross and Enderlin, PA
2435 East North Street, Mailbox 222
Greenville, South Carolina 29605

RE: Rebecca Price v. Michael R. Turner

Dear Mr. Enderlin:

The South Carolina Office of Appellate Defense served copies of the Initial Brief of Appellant in the above-referenced case on our office. I am returning the briefs to you as the South Carolina Attorney General's Office is not a party in this action.

Sincerely,

/s/ Salley W. Elliott
Salley W. Elliott
Assistant Deputy Attorney General

kws

cc: The Honorable Kenneth A. Richstad
Joseph L. Savitz, III, Esquire

[ON ROSS AND ENDERLIN, PA'S LETTERHEAD]

[STAMP: RECEIVED
JUN 13 2008
SC COURT OF APPEALS]

June 12, 2008

The Honorable Kenneth A. Richstad
Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Rebecca Price v. Michael R. Turner

Dear Mr. Richstad:

The above case is an appeal from a contempt of court for failure to pay child support. On May 15, 2008, the Attorney General's office informed the court that they did not consider themselves a party and would not be participating in the case. In a similar matter before the Supreme Court (Tony Strange v. The State) the Attorney General did participate and the ACLU, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Brennan Center, and the South Carolina Association of Criminal Defense Lawyers filed a joint Amicus Brief on behalf of Mr. Strange; it is my understanding that all or most of these organizations will again be asking to file amicus in this action. Ms. Price has contacted us and it is apparent that she is concerned about her responsibilities in this matter and I fear she is unable to hire counsel to help her in this matter.

I am unable to give Ms. Price advice on what she should do, and I am hesitant to exploit a potentially indigent person's inability to hire counsel, especially in a

matter where we are advocating the right of an indigent person to have court appointed counsel. While I do not think I can ethically make a motion to have counsel appointed for an opposing party, ethically and morally, I think I am required to inform you that it is my feeling Ms. Price is requesting some type of assistance.

Finally, I forwarded an appointment order to your office on April 30, 2008 and have not heard back from you; if you need additional information, please let me know.

Thank you for your kind attention to this matter.

Sincerely,

/s/ Derek J. Enderlin
Derek J. Enderlin

Ec Joseph Savitz, Esquire
Katherine Hudgins, Esquire
Salley Eliott, Esquire

cc Rebecca Price

[ON SOUTH CAROLINA COURT OF APPEALS LETTERHEAD]

[STAMP: RECEIVED
JUL 11 2008
SC COURT OF APPEALS]

June 23, 2008

Derek J. Enderlin, Esquire
Ross and Enderlin, PA
2435 E. North St., Mailbox 222
Greenville, SC 29605

Re: Price, Rebecca v. Turner, Michael D.

Dear Counsel:

This office has received your letter of June 12, 2008. There is no need for a formal appointment order as you are already noted by our office as representing Mr. Turner.

With respect to Ms. Price, she may proceed pro se in this matter and file a respondent's initial brief and designation of matter no later than July 23, 2008. The rules of appellate procedure utilized by this court are available on the Judicial Department website.

Very truly yours,

/s/ V. Claire Allen
CLERK

cc Chief Appellate Defender Joseph L. Savitz, III
Rebecca L. Price

[ON SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE LETTERHEAD]

[STAMP: RECEIVED
AUG 18 2008
SC COURT OF APPEALS]

August 18, 2008

Dear Mr. Richstad:

The final brief of appellant in the above case is due to be served and filed with the Court today. However, due to my heavy work-load, I am requesting a twenty day extension in which to serve and file this brief.

By copy of this email, I am informing Rebecca Price.

Sincerely,

/s/ M. Celia Robinson
M. Celia Robinson
Appellate Defender

cc: Rebecca Price

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County
Timothy M. Cain, Family Court Judge

REBECCA PRICE,
RESPONDENT,

V.

MICHAEL R. TURNER,
APPELLANT

[STAMP: RECEIVED
AUG 19 2008
SC COURT OF APPEALS]

[STAMP: ORIGINAL]

FINAL BRIEF OF APPELLANT

DEREK J. ENDERLIN
Ross and Enderlin, PA
2435 East North Street, Mailbox 222
Greenville, SC 29605
864-242-0029
Katherine H. Hudgins
South Carolina Commission
on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2009 MAR 23 A 9:13]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

* Original form completed by typewriter and by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY APRIL 19, 2009 AT 02:00 PM. TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ Beverly Whitfield
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

03/04/2009 MUST BRING PROOF OF EMPLOYMENT

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 8,817.28 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 03/04/2009 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ Beverly Whitfield
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
4TH DAY OF MAR 2009

/s/ [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 12032017

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT–PERSONALLY
(✓) Mrs. Turner-Mother , A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

ON THE 19th DAY OF March, 2009.

/s/ JP[illegible] Manley A.C.S.O.
DEPUTY SHERIFF –
OCONEE CO. CLERK OF COURT

SWORN TO ME THIS THE
20th DAY OF March, 09

/s/ Christy L. Lee
NOTARY PUBLIC FOR
SOUTH CAROLINA

TURNER, MICHAEL D.
20030472
03/04/2009 CRT DATE 04/01/2009
482527 GROUP CD: N

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

DSS STATE
PLAINTIFF

vs.

MICHAEL D. TURNER
DEFENDANT

ORDER FOR CONTEMPT OF COURT*

[STAMP: FILED OCONEE, SC
CLERK OF COURT
2009 APR 10 P 3:12]

FILE NO: 2003-DR-37-472
HEARING DATE 04/01/09
ATTY FOR PLAINTIFF
ATTY FOR DEFENDANT
JUDGE CAIN
COURT REPORTER LESA WILLIAMS
GUARDIAN AD LITEM

Pursuant to (Rule to Show Cause) (Bench Warrant), this matter was heard on the date shown above. Plaintiff (did) (did not) appear. Defendant (did) (did not) appear. I find the Defendant owes a support balance of $ as of the hearing date. I find that the Defendant's failure to make support payments when due

* Original form completed by typewriter and by hand.

(was) (was not) willful. My conclusions are based on the following facts:

( ) Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due.

( ) Defendant (has) (does not have) a physical or mental impairment which (prevents) (does not prevent) defendant from being gainfully employed.

(XX) Other: SERVED MOTHER

_____

_____

_____

Therefore, I find:

___ Defendant is not in contempt of this court.

___ Defendant is in contempt of court, and I order that Defendant be confined to the Oconee County Detention Center.

Defendant may purge himself/herself of contempt and be released from confinement by:

___ continue payments as previously ordered.

___ payment of fine of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of court costs related to this proceeding of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of $ _____ to the Oconee County Clerk of Court on or before _____ to apply against outstanding account balance.

___ _____

_____

Confinement shall commence

___ immediately

___ if fine, court costs, or payment to account balance is not made as ordered above

___ the entire period of confinement shall be served (no work time or good time credit to be given)

___ Work release eligible upon discretion of the Oconee County Detention Center

PROVIDED that the period of confinement shall not exceed one (1) year or _____

IT IS FURTHER ORDERED that Defendant shall:

___ pay the sum of $____ (plus 5% court costs) per _____ to apply against arrearages, commencing _____, in addition to previously ordered support payments

IT IS FURTHER ORDERED

___ enforcement of collection of the support arrearages shall be held in abeyance until further order of the Court.

___ the Clerk of Court shall implement wage withholding immediately.

___ this order shall serve as a bench warrant for the arrest of above named defendant, with confinement until brought before the Court for a hearing.

___ defendant to be immediately released from Oconee County Detention Center

✓ Issue Bench Warrant for failure to pay _____

_____

IT IS FURTHER ORDERED that at all times the parties shall advise the Clerk of Court of their current

residence and mailing addresses, telephone numbers, and current employers.

Walhalla,
South Carolina

Dated: 4-10-09

/s/ [illegible]
PRESIDING JUDGE
THE FAMILY COURT OF THE TENTH
JUDICIAL CIRCUIT

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

DSS-State
PLAINTIFF

vs.

Michael D. Turner
DEFENDANT

ORDER FOR CONTEMPT OF COURT*

[STAMP: FILED OCONEE, SC
CLERK OF COURT
2009 APR 29 P 5:12]

FILE NO: 2003-DR-37-472
HEARING DATE 4/29/09
ATTY FOR PLAINTIFF
ATTY FOR DEFENDANT
JUDGE Cain
COURT REPORTER Lesa Williams
GUARDIAN AD LITEM

Pursuant to (Rule to Show Cause) (Bench Warrant), this matter was heard on the date shown above. Plaintiff (did) (did not) appear. Defendant (did) (did not) appear. I find the Defendant owes a support balance of $9,251.84 as of the hearing date. I find that the Defen-

* Original form completed by hand. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

dant's failure to make support payments when due (was) (was not) willful. My conclusions are based on the following facts:

( ) Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due.

( ) Defendant (has) (does not have) a physical or mental impairment which (prevents) (does not prevent) defendant from being gainfully employed.

( ) Other:_____

_____

[REDACTED]_____

_____

Therefore, I find:

___ Defendant is not in contempt of this court.

__✓__ Defendant is in contempt of court, and I order that Defendant be confined to the Oconee County Detention Center.

Defendant may purge himself/herself of contempt and be released from confinement by:

__✓__ continue payments as previously ordered.

___ payment of fine of $_____ to the Oconee County Clerk of Court on or before _____.

___ payment of court costs related to this proceeding of $_____ to the Oconee County Clerk of Court on or before _____.

__✓__ payment of $ 2500.00 (plus 5% court fee) to the Oconee County Clerk of Court on or before release to apply against outstanding account balance.

___ _____

Confinement shall commence

___ immediately

___ if fine, court costs, or payment to account balance is not made as ordered above

___ the entire period of confinement shall be served (no work time or good time credit to be given)

___ Work release eligible upon discretion of the Oconee County Detention Center

PROVIDED that the period of confinement shall not exceed one (1) year or 6 mths

IT IS FURTHER ORDERED that Defendant shall:

___ pay the sum of $____ (plus 5% court costs) per _____ to apply against arrearages, commencing _____, in addition to previously ordered support payments

IT IS FURTHER ORDERED

___ enforcement of collection of the support arrearages shall be held in abeyance until further order of the Court.

___ the Clerk of Court shall implement wage withholding immediately.

___ this order shall serve as a bench warrant for the arrest of above named defendant, with confinement until brought before the Court for a hearing.

___ defendant to be immediately released from Oconee County Detention Center

___ _____ _____

_____

IT IS FURTHER ORDERED that at all times the parties shall advise the Clerk of Court of their current

residence and mailing addresses, telephone numbers, and current employers.

Walhalla,
South Carolina

/s/ [illegible signature]
PRESIDING JUDGE
THE FAMILY COURT OF THE TENTH
JUDICIAL CIRCUIT

Dated: 4/29/09

IN THE FAMILY COURT OF THE
TENTH JUDICIAL CIRCUIT
CASE NO. 2003-DR-37-472

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

SC DSS / Rebecca Price,
Plaintiff,

-vs-

Michael D. Turner,
Defendant.

APRIL 29, 2009
OCONEE COUNTY, SOUTH CAROLINA

TRANSCRIPT OF RECORD*

BEFORE:

THE HONORABLE TIMOTHY M. CAIN, JUDGE

APPEARANCES:

Michael D. Turner
Pro Se

LESA D. WILLIAMS
Family Court Reporter

[Tables omitted]

The Clerk: Case Number 2003-DR-37-472, DSS State versus Michael D. Turner. The account balance is Nine Thousand Two Fifty-one Eighty-four. The payment amount is Seventy-five Dollars and 32/100

---

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

($75.32), and of that amount Twenty-one Dollars ($21.00) is arrears, ordered weekly. The last payment received was May 5, 2008, and that was an undisclosed source.

The Court: Okay. Sir, would you please raise your right hand. Do you solemnly swear or affirm to tell the truth, so help you God?

Mr. Turner: Yes, sir.

The Court: Anything you want to say?

Mr. Turner: No, sir. I just got out -- I done a year '07 to '08, got out for like four months. I've tried to find a job. I, honest to God, have tried this time. There's no work out there hardly for carpenters. I couldn't find anything, so I been putting in applications in grocery stores, you name it. I've got in applications. I have tried. I've honestly tried this time. That's all I can say. I can't find no work. As far as the bench warrant goes, I gave them my new address when I left. I never seen them. I never seen nobody, unless it was mama's house. I didn't talk to mama until like two weeks ago and it was too late then because I was supposed to be in Court on the first. Mama told me about it like two weeks ago.

The Court: What is your address?

Mr. Turner: [REDACTED] (phonetic), Oconee. They got my mama's old address from where I was living this time before, but ---

The Court: [REDACTED], is that in Seneca or?

Mr. Turner: Yes, sir.

The Court: Okay. All right. If there's nothing further, I find the Defendant in willful contempt of the prior Order of the Court and I am going to sentence him to -- You said the last payment was May of '08?

The Clerk: Yes, sir.

The Court: I'm going to sentence him to six months in the Oconee County Detention Center and he may purge himself of the contempt and avoid the sentence by payment of Twenty-five Hundred Dollars ($2,500.00) on the account on or before his release.

Mr. Turner: Sir, I don't know how that payment got made. I was in jail at the time.

The Court: It come out of your taxes.

Mr. Turner: Oh.

End of Transcript.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF
COUNTY OF OCONEE) REPORTER

I, THE UNDERSIGNED LESA D. WILLIAMS, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF ALL REQUESTED PROCEEDINGS RECORDED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE FAMILY COURT OF OCONEE COUNTY, SOUTH CAROLINA, ON THE 29TH DAY OF APRIL, 2009.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

JULY 6, 2010

/s/ Lesa D. Williams
LESA D. WILLIAMS
FAMILY COURT REPORTER

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

SC Department of Social Services,
Plaintiff,

vs.

Michael D. Turner
Defendant.

Case No. 2003-DR-37-472
CSED No. 0482527

[STAMP: FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2009 MAY 26 P 4:29]

[LARGE STAMP: IVD]

MOTION AND ORDER TO CHANGE PAYEE*

Attorney for Plaintiff moves to change the payee in the above-captioned action, based on the following reason or reasons:

The minor child in this case, B.L.P. (DOB XX/XX/1996), is now in the physical custody of Judy Price.

---

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

I SO MOVE:
05/19 , 2009

/s/ Tarita A. Dunbar
Tarita A. Dunbar
Attorney for SCDSS/CSED

There being sufficient cause shown in this motion, **IT IS THEREFORE ORDERED** that the payee in this case will be reflected as Judy Price. The Oconee County Clerk of Court will continue to forward payments in this matter to the Department of Social Services Financial Division in Columbia, South Carolina. This order is without prejudice to any party.

AND IT IS SO ORDERED.

/s/ [illegible]
PRESIDING JUDGE
FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, SC
5-26, 2009

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
–VS.–

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
CLERK OF COURT
2009 SEP 21 A 11:55]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY SEPTEMBER 9, 2009 AT 02:00 PM, TO

* Original form completed by typewriter and by hand.

SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ Beverly H. Whitfield
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

08/07/2009 MUST BRING PROOF OF EMPLOYMENT

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 10,066.64 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 08/07/2009 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003.

/s/ Beverly H. Whitfield
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
7TH DAY OF AUG, 09

/s/ [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 07182013

AFFIDAVIT OF PERSONAL SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO: ( ) RESPONDENT–PERSONALLY
( ) RESPONDENT–NON SERVICE

( ) _____, A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

( ) OTHER _____

ON THE _____ DAY OF _____, 20____.

_____
DEPUTY SHERIFF -
OCONEE CO. CLERK OF COURT

SWORN TO ME THIS THE
_____ DAY OF _____, 20_____.

_____
NOTARY PUBLIC FOR
SOUTH CAROLINA
MY COMMISSION EXPIRES _____

TURNER, MICHAEL D.
20030472
08/07/2009 CRT DATE 09/09/2009
482527 GROUP CD: N
PTNR:DSS-STATE

[HANDWRITTEN NOTE:
Return Court date passed
9/15/09
S. Cause]

The Supreme Court of South Carolina

Rebecca Price, Respondent,

v.

Michael D. Turner, Appellant.

The Honorable Timothy M. Cain
Oconee County
Trial Court Case No. 2003-DR-37-00472

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court.

IT IS SO ORDERED.

/s/ [illegible] C.J.
FOR THE COURT

Columbia, South Carolina

September 28, 2009

cc: Derek L. Enderlin, Esquire
Office of Appellate Defense
Ms. Rebecca L. Price
The Honorable Jeanette Barber

STATE OF SOUTH CAROLINA
OCONEE CO. CLERK OF COURT

FAMILY COURT
20030472
482527

SC DEPT OF SOCIAL SERVICES
PETITIONER
-VS.-

TURNER, MICHAEL D.
[REDACTED]
RESPONDENT

SS# [REDACTED]
DOB [REDACTED]

[STAMP: FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2010 MAY 26 A 10:57]

[LARGE STAMP: IV-D]

RULE TO SHOW CAUSE*

IT APPEARS THAT YOU, TURNER, MICHAEL D., HAVE FAILED TO OBEY A COURT ORDER. IT IS NOW ORDERED:

* Original form completed by typewriter. Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

THAT YOU DO APPEAR IN THE FAMILY COURT, COURTHOUSE ON WEDNESDAY JUNE 23, 2010 AT 02:00 PM, TO SHOW CAUSE WHY YOU SHOULD NOT BE HELD IN CONTEMPT.

/s/ Beverly H. Whitfield
CLERK/JUDGE, FAMILY COURT OF
THE TENTH JUDICIAL CIRCUIT

05/26/2010 MUST BRING PROOF OF EMPLOYMENT

AFFIDAVIT

THE UNDERSIGNED OFFICER OF THE COURT STATES UNDER OATH THAT YOU ARE 12,293.76 BEHIND IN COURT ORDERED CHILD SUPPORT, AS OF 05/26/2010 AND SUCH PAYMENTS AS DUE ON THE COURT DATE. AND YOU WERE ORDERED TO PAY CHILD SUPPORT BY ORDER(S) DATED 06/18/2003

/s/ Beverly H. Whitfield
CLERK OF COURT, OCONEE CO.
CLERK OF COURT

SWORN TO ME THIS THE
26TH DAY OF MAY, 10

/s/ [illegible]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 07182013

AFFIDAVIT OF PERSONAL SERVICE / NON SERVICE

THE UNDERSIGNED OFFICER STATES UNDER OATH THAT HE SERVED THIS DOCUMENT

TO:

( ) RESPONDENT–PERSONALLY

( ) RESPONDENT–NON SERVICE

( ) _____, A PERSON OF AGE AT RESPONDENT'S RESIDENCE.

( ) OTHER_____

ON THE _____ DAY OF _____, 20____.

_____

DEPUTY SHERIFF –
OCONEE CO. CLERK OF COURT

SWORN TO ME THIS THE
_____ DAY OF _____, 20____.

_____

NOTARY PUBLIC FOR
SOUTH CAROLINA
MY COMMISSION EXPIRES _____

TURNER, MICHAEL D.
20030472
05/26/2010 CRT DATE 06/23/2010
482527 GROUP CD: N
PTNR:DSS-STATE

IN THE FAMILY COURT
TENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

SC Department of Social Services
Plaintiff,

vs.

Michael Turner
Defendant.

Case No. 2003-DR-37-472
CSED No. 0482527

[STAMP: FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2010 SEP 22 A 9:01]

[LARGE STAMP: IV-D]

MOTION AND ORDER TO CHANGE PAYEE*

Attorney for Plaintiff moves to change the payee in the above-captioned action, based on the following reason or reasons:

The minor child in this case, B.L.P. (DOB XX/XX/1996), is now in the physical custody of Larry Price.

* Personal identification information—such as Social Security numbers, addresses, full names of minors, and dates of birth—has been redacted.

I SO MOVE:
09/13, 2010

/s/ Tarita A. Dunbar
Tarita A. Dunbar
Attorney for SCDSS/CSED

There being sufficient cause shown in this motion, **IT IS THEREFORE ORDERED** that the payee in this case will be reflected as Larry Price. The Oconee County Clerk of Court will continue to forward payments in this matter to the Department of Social Services Financial Division in Columbia, South Carolina. This order is without prejudice to any party.

AND IT IS SO ORDERED.

/s/ [illegible]
PRESIDING JUDGE
FAMILY COURT
TENTH JUDICIAL CIRCUIT

Walhalla, SC
9-22-10, 2010

[STAMP: A TRUE COPY
DEC 9 2010
CLERK OF COURT OCONEE COUNTY]

FAMILY COURT HISTORY POSTED THRU 12/09/10

CASE NBR-20-030472	DEFENDANT	PLAINTIFF
AGNBR-482527	TURNER, MICHAEL D.	DSS-STATE
ACCT TYPE.....S		PAY TO
GROUP.....D		SC DSS
FREQUENCY..W	PHONE NUMBER IS MOTHER	O/B/O LARRY PRICE
STATUS.....	29678	

ORDER START DATE. 07/11/03
LAST BW ISSUE DATE. . . . 04/10/09
LAST DATE RULED IN. . . . 06/23/10
LAST PAID DATE 05/05/08

---STATUS---

PERIODIC PAYMENT

CUR PYMT.....	51.73	CUR DUE....	12685.89	CUR BAL.....	13329.96
ARR PYMT.....	20.00	ARR DUE....	394.59	ARREARS BAL..	484.76
FEE.....	3.59	FEE DUE....	734.24	----------	
	----------		----------	TOT ACT BAL.....	13814.72
TOT PYMT.....	75.32	TOT DUE....	13814.72	ABEYANCE AMT.	.00

--A C T I V I T Y—

FROM 00/00/00 THRU 12/09/10

CASE NBR-20-09472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	12/03/10	75.32		51.73	20.00	3.59	13814.72
C	11/26/10	75.32		51.73	20.00	3.59	13760.40
C	11/19/10	75.32		51.73	20.00	3.59	13706.08
C	11/12/10	75.32		51.73	20.00	3.59	13651.76
C	11/05/10	75.32		51.73	20.00	3.59	13597.44
C	10/29/10	75.32		51.73	20.00	3.59	13543.12
C	10/22/10	75.32		51.73	20.00	3.59	13488.80
C	10/15/10	75.32		51.73	20.00	3.59	13434.48
C	10/08/10	75.32		51.73	20.00	3.59	13380.16
C	10/01/10	75.32		51.73	20.00	3.59	13325.84
C	09/24/10	75.32		51.73	20.00	3.59	13271.52

CASE NBR-20020472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	09/17/10	75.32		51.73	20.00	3.59	13217.20
C	09/10/10	75.32		51.73	20.00	3.59	13162.88
C	09/03/10	75.32		51.73	20.00	3.59	13108.56
C	08/27/10	75.32		51.73	20.00	3.59	13054.24
C	08/20/10	75.32		51.73	20.00	3.59	12999.92
C	08/13/10	75.32		51.73	20.00	3.59	12945.60
C	08/06/10	75.32		51.73	20.00	3.59	12891.28
C	07/30/10	75.32		51.73	20.00	3.59	12836.96
C	07/23/10	75.32		51.73	20.00	3.59	12782.64
C	07/16/10	75.32		51.73	20.00	3.59	12728.32
C	07/09/10	75.32		51.73	20.00	3.59	12674.00
C	07/02/10	75.32		51.73	20.00	3.59	12619.68
C	06/25/10	75.32		51.73	20.00	3.59	12565.36
C	06/18/10	75.32		51.73	20.00	3.59	12511.04
C	06/11/10	75.32		51.73	20.00	3.59	12456.72
C	06/04/10	75.32		51.73	20.00	3.59	12402.40

CASE NBR-20090472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	05/28/10	75.32		51.73	20.00	3.59	12348.08
C	05/21/10	75.32		51.73	20.00	3.59	12293.76
C	05/14/10	75.32		51.73	20.00	3.59	12239.44
C	05/07/10	75.32		51.73	20.00	3.59	12185.12
C	04/30/10	75.32		51.73	20.00	3.59	12130.80
C	04/23/10	75.32		51.73	20.00	3.59	12076.48
C	04/16/10	75.32		51.73	20.00	3.59	12022.16
C	04/09/10	75.32		51.73	20.00	3.59	11967.84
C	04/02/10	75.32		51.73	20.00	3.59	11913.52
C	03/26/10	75.32		51.73	20.00	3.59	11859.20
C	03/19/10	75.32		51.73	20.00	3.59	11804.88
C	03/12/10	75.32		51.73	20.00	3.59	11750.56
C	03/05/10	75.32		51.73	20.00	3.59	11696.24
C	02/26/10	75.32		51.73	20.00	3.59	11641.92
C	02/19/10	75.32		51.73	20.00	3.59	11587.60
C	02/12/10	75.32		51.73	20.00	3.59	11533.28

CASE NBR-20090472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	02/05/10	75.32		51.73	20.00	3.59	11478.96
C	01/29/10	75.32		51.73	20.00	3.59	11424.64
C	01/22/10	75.32		51.73	20.00	3.59	11370.32
C	01/15/10	75.32		51.73	20.00	3.59	11316.00
C	01/08/10	75.32		51.73	20.00	3.59	11261.68
C	01/01/10	75.32		51.73	20.00	3.59	11207.36
C	12/25/09	75.32		51.73	20.00	3.59	11153.04
C	12/18/09	75.32		51.73	20.00	3.59	11098.72
C	12/11/09	75.32		51.73	20.00	3.59	11044.40
C	12/04/09	75.32		51.73	20.00	3.59	10990.08
C	11/27/09	75.32		51.73	20.00	3.59	10935.76
C	11/20/09	75.32		51.73	20.00	3.59	10881.44
C	11/13/09	75.32		51.73	20.00	3.59	10827.12
C	11/06/09	75.32		51.73	20.00	3.59	10772.80
C	10/30/09	75.32		51.73	20.00	3.59	10718.48
C	10/23/09	75.32		51.73	20.00	3.59	10664.16

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	10/16/09	75.32		51.73	20.00	3.59	10609.84
C	10/09/09	75.32		51.73	20.00	3.59	10555.52
C	10/02/09	75.32		51.73	20.00	3.59	10501.20
C	09/25/09	75.32		51.73	20.00	3.59	10446.88
C	09/18/09	75.32		51.73	20.00	3.59	10392.56
C	09/11/09	75.32		51.73	20.00	3.59	10338.24
C	09/04/09	75.32		51.73	20.00	3.59	10283.92
C	08/28/09	75.32		51.73	20.00	3.59	10229.60
C	08/21/09	75.32		51.73	20.00	3.59	10175.28
C	08/14/09	75.32		51.73	20.00	3.59	10120.96
C	08/07/09	75.32		51.73	20.00	3.59	10066.64
C	07/31/09	75.32		51.73	20.00	3.59	10012.32
C	07/24/09	75.32		51.73	20.00	3.59	9958.00
C	07/17/09	75.32		51.73	20.00	3.59	9903.68
C	07/10/09	75.32		51.73	20.00	3.59	9849.36
C	07/03/09	75.32		51.73	20.00	3.59	9795.04

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	06/26/09	75.32		51.73	20.00	3.59	9740.72
C	06/19/09	75.32		51.73	20.00	3.59	9686.40
C	06/12/09	75.32		51.73	20.00	3.59	9632.08
C	06/05/09	75.32		51.73	20.00	3.59	9577.76
C	05/29/09	75.32		51.73	20.00	3.59	9523.44
C	05/22/09	75.32		51.73	20.00	3.59	9469.12
C	05/15/09	75.32		51.73	20.00	3.59	9414.80
C	05/08/09	75.32		51.73	20.00	3.59	9360.48
C	05/01/09	75.32		51.73	20.00	3.59	9306.16
C	04/24/09	75.32		51.73	20.00	3.59	9251.84
C	04/17/09	75.32		51.73	20.00	3.59	9197.52
C	04/10/09	75.32		51.73	20.00	3.59	9143.20
C	04/03/09	75.32		51.73	20.00	3.59	9088.88
C	03/27/09	75.32		51.73	20.00	3.59	9034.56
C	03/20/09	75.32		51.73	20.00	3.59	8980.24
C	03/13/09	75.32		51.73	20.00	3.59	8925.92

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	03/06/09	75.32		51.73	20.00	3.59	8871.60
C	02/27/09	75.32		51.73	20.00	3.59	8817.28
C	02/20/09	75.32		51.73	20.00	3.59	8762.96
C	02/13/09	75.32		51.73	20.00	3.59	8708.64
C	02/06/09	75.32		51.73	20.00	3.59	8654.32
C	01/30/09	75.32		51.73	20.00	3.59	8600.00
C	01/23/09	75.32		51.73	20.00	3.59	8545.68
C	01/16/09	75.32		51.73	20.00	3.59	8491.36
C	01/09/09	75.32		51.73	20.00	3.59	8437.04
C	01/02/09	75.32		51.73	20.00	3.59	8382.72
C	12/26/08	75.32		51.73	20.00	3.59	8328.40
C	12/19/08	75.32		51.73	20.00	3.59	8274.08
C	12/12/08	75.32		51.73	20.00	3.59	8219.76
C	12/05/08	75.32		51.73	20.00	3.59	8165.44
C	11/28/08	75.32		51.73	20.00	3.59	8111.12
C	11/21/08	75.32		51.73	20.00	3.59	8056.80

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	11/14/08	75.32		51.73	20.00	3.59	8002.48
C	11/07/08	75.32		51.73	20.00	3.59	7948.16
C	10/31/08	75.32		51.73	20.00	3.59	7893.84
C	10/24/08	75.32		51.73	20.00	3.59	7839.52
C	10/17/08	75.32		51.73	20.00	3.59	7785.20
C	10/10/08	75.32		51.73	20.00	3.59	7730.88
C	10/03/08	75.32		51.73	20.00	3.59	7676.56
C	09/26/08	75.32		51.73	20.00	3.59	7622.24
C	09/19/08	75.32		51.73	20.00	3.59	7567.92
C	09/12/08	75.32		51.73	20.00	3.59	7513.60
C	09/05/08	75.32		51.73	20.00	3.59	7459.28
C	08/29/08	75.32		51.73	20.00	3.59	7404.96
C	08/22/08	75.32		51.73	20.00	3.59	7350.64
C	08/15/08	75.32		51.73	20.00	3.59	7296.32
C	08/08/08	75.32		51.73	20.00	3.59	7242.00
C	08/01/08	75.32		51.73	20.00	3.59	7187.68

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	07/25/08	75.32		51.73	20.00	3.59	7133.36
C	07/18/08	75.32		51.73	20.00	3.59	7079.04
C	07/11/08	75.32		51.73	20.00	3.59	7024.72
C	07/04/08	75.32		51.73	20.00	3.59	6970.40
C	06/27/08	75.32		51.73	20.00	3.59	6916.08
C	06/20/08	75.32		51.73	20.00	3.59	6861.76
C	06/13/08	75.32		51.73	20.00	3.59	6807.44
C	06/06/08	75.32		51.73	20.00	3.59	6753.12
C	05/30/08	75.32		51.73	20.00	3.59	6698.80
P	05/28/08	NON CUSTOD	178.00	51.73	.00	.00	6644.48
C	05/23/08	75.32		51.73	20.00	3.59	6822.48
C	05/16/08	75.32		51.73	20.00	3.59	6768.16
C	05/09/08	75.32		51.73	20.00	3.59	6713.84
C	05/05/08	NON CUSTOD	47.00	.00	44.76	2.24	6659.52
C	05/02/08	75.32		51.73	20.00	3.59	6706.52
C	04/25/08	75.32		51.73	20.00	3.59	6652.20

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	04/18/08	75.32		51.73	20.00	3.59	6597.88
C	04/11/08	75.32		51.73	20.00	3.59	6543.56
C	04/04/08	75.32		51.73	20.00	3.59	6489.24
C	03/28/08	75.32		51.73	20.00	3.59	6434.92
C	03/21/08	75.32		51.73	20.00	3.59	6380.60
C	03/14/08	75.32		51.73	20.00	3.59	6326.28
C	03/07/08	75.32		51.73	20.00	3.59	6271.96
C	02/29/08	75.32		51.73	20.00	3.59	6217.64
C	02/22/08	75.32		51.73	20.00	3.59	6163.32
C	02/15/08	75.32		51.73	20.00	3.59	6109.00
C	02/08/08	75.32		51.73	20.00	3.59	6054.68
C	02/01/08	75.32		51.73	20.00	3.59	6000.36
C	01/25/08	75.32		51.73	20.00	3.59	5946.04
C	01/18/08	75.32		51.73	20.00	3.59	5891.72
C	01/11/08	75.32		51.73	20.00	3.59	5837.40
C	01/04/08	75.32		51.73	20.00	3.59	5783.08

CASE NBR-20430472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	12/28/07	75.32		51.73	20.00	3.59	5728.76
C	12/21/07	75.32		51.73	20.00	3.59	5674.44
C	12/14/07	75.32		51.73	20.00	3.59	5620.12
C	12/07/07	75.32		51.73	20.00	3.59	5565.80
C	11/30/07	75.32		51.73	20.00	3.59	5511.48
C	11/23/07	75.32		51.73	20.00	3.59	5457.16
C	11/16/07	75.32		51.73	20.00	3.59	5402.84
C	11/09/07	75.32		51.73	20.00	3.59	5348.52
C	11/02/07	75.32		51.73	20.00	3.59	5294.20
C	10/26/07	75.32		51.73	20.00	3.59	5239.88
C	10/19/07	75.32		51.73	20.00	3.59	5185.56
C	10/12/07	75.32		51.73	20.00	3.59	5131.24
C	10/05/07	75.32		51.73	20.00	3.59	5076.92
C	09/28/07	75.32		51.73	20.00	3.59	5022.60
C	09/21/07	75.32		51.73	20.00	3.59	4968.28
C	09/14/07	75.32		51.73	20.00	3.59	4913.96

CASE NBR-20-090472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	09/07/07	75.32		51.73	20.00	3.59	4859.64
C	08/31/07	75.32		51.73	20.00	3.59	4805.32
C	08/24/07	75.32		51.73	20.00	3.59	4751.00
C	08/17/07	75.32		51.73	20.00	3.59	4696.68
C	08/10/07	75.32		51.73	20.00	3.59	4642.36
C	08/03/07	75.32		51.73	20.00	3.59	4588.04
C	07/27/07	75.32		51.73	20.00	3.59	4533.72
C	07/20/07	75.32		51.73	20.00	3.59	4479.40
C	07/13/07	75.32		51.73	20.00	3.59	4425.08
C	07/06/07	75.32		51.73	20.00	3.59	4370.76
C	06/29/07	75.32		51.73	20.00	3.59	4316.44
C	06/22/07	75.32		51.73	20.00	3.59	4262.12
C	06/15/07	75.32		51.73	20.00	3.59	4207.80
C	06/08/07	75.32		51.73	20.00	3.59	4153.48
C	06/01/07	75.32		51.73	20.00	3.59	4099.16
C	05/25/07	75.32		51.73	20.00	3.59	4044.84

CASE NBR-2042472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	05/18/07	75.32		51.73	20.00	3.59	3990.52
C	05/11/07	75.32		51.73	20.00	3.59	3936.20
C	05/04/07	75.32		51.73	20.00	3.59	3881.88
C	04/27/07	75.32		51.73	20.00	3.59	3827.56
C	04/20/07	75.32		51.73	20.00	3.59	3773.24
C	04/13/07	75.32		51.73	20.00	3.59	3718.92
C	04/06/07	75.32		51.73	20.00	3.59	3664.60
C	03/30/07	75.32		51.73	20.00	3.59	3610.28
C	03/23/07	75.32		51.73	20.00	3.59	3555.96
C	03/16/07	75.32		51.73	20.00	3.59	3501.64
C	03/09/07	75.32		51.73	20.00	3.59	3447.32
C	03/02/07	75.32		51.73	20.00	3.59	3393.00
C	02/23/07	75.32		51.73	20.00	3.59	3338.68
C	02/16/07	75.32		51.73	20.00	3.59	3284.36
C	02/09/07	75.32		51.73	20.00	3.59	3230.04
C	02/02/07	75.32		51.73	20.00	3.59	3175.72

CASE NBR-2040472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	01/26/07	75.32		51.73	20.00	3.59	3121.40
C	01/19/07	75.32		51.73	20.00	3.59	3067.08
C	01/12/07	75.32		51.73	20.00	3.59	3012.76
C	01/05/07	75.32		51.73	20.00	3.59	2958.44
C	12/29/06	75.32		51.73	20.00	3.59	2904.12
C	12/22/06	75.32		51.73	20.00	3.59	2849.80
C	12/15/06	75.32		51.73	20.00	3.59	2795.48
C	12/08/06	75.32		51.73	20.00	3.59	2741.16
C	12/01/06	75.32		51.73	20.00	3.59	2686.84
C	11/24/06	75.32		51.73	20.00	3.59	2632.52
C	11/17/06	75.32		51.73	20.00	3.59	2578.20
C	11/10/06	75.32		51.73	20.00	3.59	2523.88
C	11/03/06	75.32		51.73	20.00	3.59	2469.56
C	10/27/06	75.32		51.73	20.00	3.59	2415.24
C	10/20/06	75.32		51.73	20.00	3.59	2360.92
C	10/13/06	75.32		51.73	20.00	3.59	2306.60

CASE NBR-20499472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	10/06/06	75.32		51.73	20.00	3.59	2252.28
C	09/29/06	75.32		51.73	20.00	3.59	2197.96
C	09/22/06	75.32		51.73	20.00	3.59	2143.64
C	09/15/06	75.32		51.73	20.00	3.59	2089.32
C	09/08/06	75.32		51.73	20.00	3.59	2035.00
C	09/01/06	75.32		51.73	20.00	3.59	1980.68
P	08/25/06	NON CUSTOD	80.00	76.19	.00	3.81	1926.36
C	08/25/06	75.32		51.73	20.00	3.59	2006.36
P	08/18/06	NON CUSTOD	60.00	57.14	.00	2.86	1952.04
C	08/18/06	75.32		51.73	20.00	3.59	2012.04
P	08/11/06	NON CUSTOD	60.00	57.14	.00	2.86	1957.72
C	08/11/06	75.32		51.73	20.00	3.59	2017.72
C	08/04/06	75.32		51.73	20.00	3.59	1963.40
C	07/28/06	75.32		51.73	20.00	3.59	1909.08
C	07/21/06	75.32		51.73	20.00	3.59	1854.76
C	07/14/06	75.32		51.73	20.00	3.59	1800.44

CASE NBR-20090472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	07/07/06	75.32		51.73	20.00	3.59	1746.12
C	06/30/06	75.32		51.73	20.00	3.59	1691.80
C	06/23/06	75.32		51.73	20.00	3.59	1637.48
C	06/16/06	75.32		51.73	20.00	3.59	1583.16
C	06/09/06	75.32		51.73	20.00	3.59	1528.84
C	06/02/06	75.32		51.73	20.00	3.59	1474.52
C	05/26/06	75.32		51.73	20.00	3.59	1420.20
C	05/19/06	75.32		51.73	20.00	3.59	1365.88
C	05/12/06	75.32		51.73	20.00	3.59	1311.56
C	05/05/06	75.32		51.73	20.00	3.59	1257.24
C	04/28/06	75.32		51.73	20.00	3.59	1202.92
C	04/21/06	75.32		51.73	20.00	3.59	1148.60
C	04/14/06	75.32		51.73	20.00	3.59	1094.28
C	04/07/06	75.32		51.73	20.00	3.59	1039.96
C	03/31/06	75.32		51.73	20.00	3.59	985.64
C	03/24/06	75.32		51.73	20.00	3.59	931.32

CASE NBR-20490472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
P	03/22/06	NON CUSTOD	1404.00	.00	1404.00	.00	877.00
C	03/17/06	75.32		51.73	20.00	3.59	2281.00
C	03/10/06	75.32		51.73	20.00	3.59	2226.68
C	03/03/06	75.32		51.73	20.00	3.59	2172.36
P	02/28/06	NON CUSTOD	35.00	33.33	.00	1.67	2118.04
C	02/24/06	75.32		51.73	20.00	3.59	2153.04
C	02/17/06	75.32		51.73	20.00	3.59	2098.72
C	02/10/06	75.32		51.73	20.00	3.59	2044.40
C	02/03/06	75.32		51.73	20.00	3.59	1990.08
A	01/30/06	ALTER CASE		1843.35-	1843.35	.00	1935.76
C	01/27/06	54.32		51.73	.00	2.59	1935.76
C	01/20/06	54.32		51.73	.00	2.59	1881.44
C	01/13/06	54.32		51.73	.00	2.59	1827.12
C	01/06/06	54.32		51.73	.00	2.59	1772.80
C	12/30/05	54.32		51.73	.00	2.59	1718.48
C	12/23/05	54.32		51.73	.00	2.59	1664.16

CASE NBR-20490472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	12/16/05	54.32		51.73	.00	2.59	1609.84
C	12/09/05	54.32		51.73	.00	2.59	1555.52
C	12/02/05	54.32		51.73	.00	2.59	1501.20
C	11/25/05	54.32		51.73	.00	2.59	1446.88
C	11/18/05	54.32		51.73	.00	2.59	1392.56
C	11/11/05	54.32		51.73	.00	2.59	1338.24
C	11/04/05	54.32		51.73	.00	2.59	1283.92
C	10/28/05	54.32		51.73	.00	2.59	1229.60
C	10/21/05	54.32		51.73	.00	2.59	1175.28
C	10/14/05	54.32		51.73	.00	2.59	1120.96
C	10/07/05	54.32		51.73	.00	2.59	1066.64
C	09/30/05	54.32		51.73	.00	2.59	1012.32
C	09/23/05	54.32		51.73	.00	2.59	958.00
C	09/16/05	54.32		51.73	.00	2.59	903.68
C	09/09/05	54.32		51.73	.00	2.59	849.36
C	09/02/05	54.32		51.73	.00	2.59	795.04

CASE NBR-20-09472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	08/26/05	54.32		51.73	.00	2.59	740.72
C	08/19/05	54.32		51.73	.00	2.59	686.40
C	08/12/05	54.32		51.73	.00	2.59	632.08
C	08/05/05	54.32		51.73	.00	2.59	577.76
C	07/29/05	54.32		51.73	.00	2.59	523.44
C	07/22/05	54.32		51.73	.00	2.59	469.12
C	07/15/05	54.32		51.73	.00	2.59	414.80
P	07/14/05	WAGE-WITH	54.32	51.73	.00	2.59	360.48
C	07/08/05	54.32		51.73	.00	2.59	414.80
C	07/01/05	54.32		51.73	.00	2.59	360.48
C	06/24/05	54.32		51.73	.00	2.59	306.16
P	06/17/05	WAGE-WITH	108.64	103.47	.00	5.17	251.84
C	06/17/05	54.32		51.73	.00	2.59	360.48
C	06/10/05	54.32		51.73	.00	2.59	306.16
C	06/03/05	54.32		51.73	.00	2.59	251.84
P	05/27/05	WAGE-WITH	108.64	103.47	.00	5.17	197.52

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	05/27/05	54.32		51.73	.00	2.59	306.16
C	05/20/05	54.32		51.73	.00	2.59	251.84
C	05/13/05	54.32		51.73	.00	2.59	197.52
C	05/06/05	54.32		51.73	.00	2.59	143.20
P	04/29/05	WAGE-WITH	108.64	103.47	.00	5.17	88.88
C	04/29/05	54.32		51.73	.00	2.59	197.52
C	04/22/05	54.32		51.73	.00	2.59	143.20
C	04/15/05	54.32		51.73	.00	2.59	88.88
C	04/08/05	54.32		51.73	.00	2.59	34.56
P	04/01/05	WAGE-WITH	162.96	155.20	.00	7.76	19.76-
C	04/01/05	54.32		51.73	.00	2.59	143.20
C	03/25/05	54.32		51.73	.00	2.59	88.88
C	03/18/05	54.32		51.73	.00	2.59	34.56
P	03/14/05	WAGE-WITH	108.64	103.47	.00	5.17	19.76-
C	03/11/05	54.32		51.73	.00	2.59	88.88
C	03/04/05	54.32		51.73	.00	2.59	34.56

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
P	03/01/05	WAGE-WITH	108.64	103.47	.00	5.17	19.76-
C	02/25/05	54.32		51.73	.00	2.59	88.88
C	02/18/05	54.32		51.73	.00	2.59	34.56
F	02/11/05	FINE PYMT	25.00				19.76-
P	02/11/05	WAGE-WITH	162.96	155.20	.00	7.76	19.76-
C	02/11/05	54.32		51.73	.00	2.59	143.20
P	02/04/05	WAGE-WITH	400.00	380.95	.00	19.05	88.88
C	02/04/05	54.32		51.73	.00	2.59	488.88
C	01/28/05	54.32		51.73	.00	2.59	434.56
P	01/24/05	WAGE-WITH	162.96	155.20	.00	7.76	380.24
C	01/21/05	54.32		51.73	.00	2.59	543.20
C	01/14/05	54.32		51.73	.00	2.59	488.88
C	01/07/05	54.32		51.73	.00	2.59	434.56
C	12/31/04	54.32		51.73	.00	2.59	380.24
P	12/29/04	WAGE-WITH	54.32	51.73	.00	2.59	325.92
C	12/24/04	54.32		51.73	.00	2.59	380.24

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
P	12/20/04	WAGE-WITH	108.64	103.47	.00	5.17	325.92
C	12/17/04	54.32		51.73	.00	2.59	434.56
C	12/10/04	54.32		51.73	.00	2.59	380.24
C	12/03/04	54.32		51.73	.00	2.59	325.92
C	11/26/04	54.32		51.73	.00	2.59	271.60
C	11/19/04	54.32		51.73	.00	2.59	217.28
C	11/12/04	54.32		51.73	.00	2.59	162.96
C	11/05/04	54.32		51.73	.00	2.59	108.64
C	10/29/04	54.32		51.73	.00	2.59	54.32
P	10/22/04	NON CUSTOD	884.79	827.39	15.06	42.34	.00
C	10/22/04	59.57		51.73	5.00	2.84	884.79
C	10/15/04	59.57		51.73	5.00	2.84	830.47
C	10/08/04	59.57		51.73	5.00	2.84	776.15
C	10/01/04	59.57		51.73	5.00	2.84	721.83
C	09/24/04	59.57		51.73	5.00	2.84	667.51
C	09/17/04	59.57		51.73	5.00	2.84	613.19

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	09/10/04	59.57		51.73	5.00	2.84	558.87
C	09/03/04	59.57		51.73	5.00	2.84	504.55
C	08/27/04	59.57		51.73	5.00	2.84	450.23
C	08/20/04	59.57		51.73	5.00	2.84	395.91
P	08/16/04	WAGE-WITH	60.00	57.14	.00	2.86	341.59
C	08/13/04	59.57		51.73	5.00	2.84	401.59
P	08/09/04	WAGE-WITH	60.00	57.14	.00	2.86	347.27
C	08/06/04	59.57		51.73	5.00	2.84	407.27
C	07/30/04	59.57		51.73	5.00	2.84	352.95
C	07/23/04	59.57		51.73	5.00	2.84	298.63
P	07/19/04	WAGE-WITH	60.00	57.14	.00	2.86	244.31
C	07/16/04	59.57		51.73	5.00	2.84	304.31
C	07/09/04	59.57		51.73	5.00	2.84	249.99
C	07/02/04	59.57		51.73	5.00	2.84	195.67
P	06/28/04	WAGE-WITH	60.00	57.14	.00	2.86	141.35
C	06/25/04	59.57		51.73	5.00	2.84	201.35

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
P	06/21/04	WAGE-WITH	60.00	51.73	5.41	2.86	147.03
C	06/18/04	59.57		51.73	5.00	2.84	207.03
P	06/14/04	WAGE-WITH	60.00	57.14	.00	2.86	152.71
C	06/11/04	59.57		51.73	5.00	2.84	212.71
P	06/07/04	WAGE-WITH	60.00	57.14	.00	2.86	158.39
C	06/04/04	59.57		51.73	5.00	2.84	218.39
P	06/01/04	WAGE-WITH	60.00	57.14	.00	2.86	164.07
C	05/28/04	59.57		51.73	5.00	2.84	224.07
P	05/24/04	WAGE-WITH	60.00	57.14	.00	2.86	169.75
C	05/21/04	59.57		51.73	5.00	2.84	229.75
P	05/17/04	WAGE-WITH	60.00	57.14	.00	2.86	175.43
C	05/14/04	59.57		51.73	5.00	2.84	235.43
P	05/11/04	WAGE-WITH	60.00	57.14	.00	2.86	181.11
C	05/07/04	59.57		51.73	5.00	2.84	241.11
C	04/30/04	59.57		51.73	5.00	2.84	186.79
P	04/27/04	NON CUSTOD	100.00	95.24	.00	4.76	132.47

CASE NBR-20409472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	04/23/04	59.57		51.73	5.00	2.84	232.47
C	04/16/04	59.57		51.73	5.00	2.84	178.15
C	04/09/04	59.57		51.73	5.00	2.84	123.83
P	04/06/04	WAGE-WITH	60.00	52.38	4.76	2.86	69.51
C	04/02/04	59.57		51.73	5.00	2.84	129.51
P	03/26/04	WAGE-WITH	120.00	114.29	.00	5.71	75.19
C	03/26/04	59.57		51.73	5.00	2.84	195.19
C	03/19/04	59.57		51.73	5.00	2.84	140.87
P	03/17/04	WAGE-WITH	60.00	57.14	.00	2.86	86.55
C	03/12/04	59.57		51.73	5.00	2.84	146.55
P	03/08/04	WAGE-WITH	120.00	114.29	.00	5.71	92.23
C	03/05/04	59.57		51.73	5.00	2.84	212.23
C	02/27/04	59.57		51.73	5.00	2.84	157.91
C	02/20/04	59.57		51.73	5.00	2.84	103.59
P	02/19/04	NON CUSTOD	340.67	324.45	.00	16.22	49.27
F	02/19/04	FINE PYMT	50.00				49.27

CASE NBR-2040290472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	02/13/04	59.57		51.73	5.00	2.84	389.94
P	02/12/04	NON CUSTOD	110.00	104.76	.00	5.24	335.62
C	02/06/04	59.57		51.73	5.00	2.84	445.62
P	02/03/04	NON CUSTOD	300.00	285.71	5.00	14.29	391.20
C	01/30/04	59.57		51.73	5.00	2.84	691.20
C	01/23/04	59.57		51.73	5.00	2.84	636.98
C	01/16/04	59.57		51.73	5.00	2.84	582.66
C	01/09/04	59.57		51.73	5.00	2.84	528.34
C	01/02/04	59.57		51.73	5.00	2.84	474.02
C	12/26/03	59.57		51.73	5.00	2.84	419.70
C	12/19/03	59.57		51.73	5.00	2.84	365.38
C	12/12/03	59.57		51.73	5.00	2.84	311.06
C	12/05/03	59.57		51.73	5.00	2.84	256.74
C	11/28/03	59.57		51.73	5.00	2.84	202.42
C	11/21/03	59.57		51.73	5.00	2.84	148.10
P	11/19/03	NON CUSTOD	150.00	142.86	.00	7.14	93.78

CASE NBR-2040472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	11/14/03	59.57		51.73	5.00	2.84	243.78
C	11/07/03	59.57		51.73	5.00	2.84	189.46
C	10/31/03	59.57		51.73	5.00	2.84	135.14
C	10/24/03	59.57		51.73	5.00	2.84	80.82
C	10/17/03	59.57		51.73	5.00	2.84	26.50
P	10/17/03	NON CUSTOD	120.57	28.38	86.45	5.74	27.82-
P	10/16/03	NON CUSTOD	550.00	428.57	95.24	26.19	92.75
F	10/16/03	FINE PYMT	50.00				92.75
P	10/13/03	NON CUSTOD	175.00	166.67	.00	8.33	642.75
C	10/10/03	59.57		51.73	5.00	2.84	817.75
C	10/03/03	59.57		51.73	5.00	2.84	763.43
P	09/30/03	NON CUSTOD	160.00	152.38	.00	7.62	709.11
C	09/26/03	59.57		51.73	5.00	2.84	869.11
C	09/19/03	59.57		51.73	5.00	2.84	814.79
C	09/12/03	59.57		51.73	5.00	2.84	760.47
C	09/05/03	59.57		51.73	5.00	2.84	706.15

CASE NBR-2040472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

CODE	DATE	CHARGE	PAYMENT	CURRENT	ARREARS	FEE-AMT	ACCT-BAL
C	08/29/03	59.57		51.73	5.00	2.84	651.83
C	08/22/03	59.57		51.73	5.00	2.84	597.51
C	08/15/03	59.57		51.73	5.00	2.84	543.19
C	08/08/03	59.57		51.73	5.00	2.84	488.87
C	08/01/03	59.57		51.73	5.00	2.84	434.55
C	07/25/03	59.57		51.73	5.00	2.84	380.23
C	07/18/03	59.57		51.73	5.00	2.84	325.91
A	07/11/03	ALTER CASE		51.73	206.92	12.94	271.59

END OF PAYMENT HISTORY

--HEARING DATA--

FROM 00/00/00 THRU 12/09/10

		CURRENT	ARREARAGE	TOT BAL
CASE NBR-20-030472	DEFENDANT		PLAINTIFF	
AGNBR-482527	TURNER, MICHAEL D.		DSS-STATE	

DATE	PRESIDING JUDGE	PYMT		BAL		
09/22/10	128CAIN, T	.00	.00	.00	.00	.00
09/22/10	MOTION AND ORDER TO CHANGE PAYEE FILED 09/22/10. ORDER					
09/22/10	STATES CHILD IS NOW IN PHYSICAL CUSTODY OF LARRY PRICE.					
09/22/10	PMTS TO CONTINUE TO BE FORWARDED TO SCDSS.					
06/08/10		.00	.00	.00	.00	.00
06/08/10	RTSC ISSUED FOR 06/23/10					
06/08/10	AFFIDAVIT OF NON SERVICE, NO SUCH #. REMOVED ADDRESS OF					
06/08/10	[REDACTED]					
11/24/09		.00	.00	.00	.00	.00
11/24/09	ENTERED NEW ADDRESS FROM INFO SHEET FOR CASE #2009-0730					
08/28/09		.00	.00	.00	.00	.00

CASE NBR-20-09472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

DATE	PRESIDING JUDGE	PYMT	BAL
08/28/09	RTSC ISSUED FOR 9/09/09		
08/28/09	AFFIDAVIT OF NON SERVICE. COURT DATE PASSED.		
05/27/09	128 CAIN, T	.00 .00 .00 .00 .00	
05/27/09	MOTION AND TO CHANGE PAYEE FILED ON 05/26/09 STATES MINOR		
05/27/09	CHILD IS NOW IN PHYSICAL CUSTODY OF JUDY PRICE. CLERK WILL		
05/27/09	FORWARD PMTS TO DSS FINANCIAL DIVISION WITH PAYEE REFLECTED		
05/27/09	AS JUDY PRICE.		
05/27/09	REMOVED REBECCA PRICE AS PAYEE AND ADDRESS OF		
05/27/09	[REDACTED]		
04/30/09	128 CAIN, T	.00 .00 .00 .00 .00	
04/30/09	ORDER DATED 04/29/09: 6 MONTHS DETENTION DEF MAY BE RELEASED		
04/30/09	UPON PAYMENT OF $2500.00 PLUS 5%. CONTINUE PMTS AS		
04/30/09	PREVIOUSLY ORDERED.		
04/10/09	128 CAIN, T	.00 .00 .00 .00 .00	
04/10/09	ORDER DATE 4/10/09 THAT STATES ISSUE BW FOR FAILURE TO PAY		
04/10/09	BENCH WARRANT ISSUED WITH NEED TO APPEAR BEFORE JUDGE IF		

CASE NBR-2040/0472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

DATE	PRESIDING JUDGE	PYMT				BAL
04/10/09	ARRESTED.					
03/23/09		.00	.00	.00	.00	.00
03/23/09	RULE TO SHOW CAUSE ISSUED FOR 4/1/09.					
03/23/09	SERVED MS TURNER, DEF MOTHER. 3/19/09					
08/07/08		.00	.00	.00	.00	.00
08/07/08	DESIGNATION OF COURT COSTS SIGNED 7/31/08					
05/28/08		.00	.00	.00	.00	.00
05/28/08	CHANGED PAYOR'S ADDRESS PER DSS T-ICEPT TRANSMITTAL. VM					
01/03/08	128 CAIN, T	.00	.00	.00	.00	.00
01/03/08	ORDER DATED 1/2/08 THAT STATES 12 MONTHS DETENTION MAY BE					
01/03/08	RELEASED UPON PMT OF ZERO BALANCE. LIEN ON ANY SS CLAIM OR					
01/03/08	SSI. WORK RELEASE ELIGIBLE.					
01/03/08	1-25-08 NOTICE OF APPEAL BY ATTY DERRICK ENDERLIN (PDF)					
12/27/07		.00	.00	.00	.00	.00
12/27/07	REC'D COPY OF APPLICATION SUMMARY FOR SSI. ALSO REC'D COPY					
12/27/07	OF APPLICATION SUMMARY FOR DISABILITY INSURANCE BENEFITS.					

CASE NBR-20409472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

DATE	PRESIDING JUDGE	PYMT				BAL
12/27/07	BOTH COPIES WERE PROVIDED BY MR. TURNER'S WIFE. VM					
08/24/06	X	.00	.00	.00	.00	.00
08/24/06	PAYEE CALLED TO CHANGE ADDRESS					
07/07/06		.00	.00	.00	.00	.00
07/07/06	BENCH WARRANT ISSUED FOR FAILURE TO PAY. WILL NEED TO APPEAR					
07/07/06	BEFORE JUDGE IF ARRESTED.					
05/05/06		.00	.00	.00	.00	.00
05/05/06	CALLED JOHN'S PAINTING TO GET ADDRESS AND TO SEE IF MR.					
05/05/06	TURNER IS WORKING THERE. TKF					
05/05/06	NO LUCK W/ANY INFORMATION					
04/20/06		.00	.00	.00	.00	.00
04/20/06	NEGOTIATION BY CLERKS OFFICE: W.WTH ORDERED. PAYOR IS					
04/20/06	CURRENTLY WORKING AT JOHN PAINTING ON HWY 24 IN ANDERSON.					
04/20/06	4-19-06 AFF SERVICE CAME BACK NOT LOCATED/IN TOWNVILLE					
04/20/06	ANDERSON CO MOTHERS RESIDENCE					
09/28/05	128CAIN, T	.00	.00	.00	.00	.00

CASE NBR-20-039472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

DATE	PRESIDING JUDGE	PYMT				BAL
09/28/05	ORDER DATED 9/28/05. 6 MONTHS DETENTION MAY PURGE BY PAYING					
09/28/05	AMT OF $75.00 COURT COST AND HAVE ZERO BALANCE ON OR BEFORE					
09/28/05	RELEASE. IF PAYOR DOES NOT PAY TO GET OUT OF JAIL PMTS TO					
09/28/05	INCREASE $20.00 PLUS 5% FEE ON ARREARS UPON RELEASE. NO WORK					
09/28/05	TIME CREDIT.					
09/16/05		.00	.00	.00	.00	.00
09/16/05	BENCH WARRANT ISSUED FOR FAILURE TO PAY. WILL NEED TO APPEAR					
09/16/05	BEFORE JUDGE IF ARRESTED.					
09/14/05	128CAIN, T	.00	.00	.00	.00	.00
09/14/05	ORDER DATED 9/14/05. ISSUE BENCH WARRANT FOR FAILURE TO PAY.					
09/14/05	NOTIFY PAYEE BY PHONE IF DEF ARRESTED.					
07/21/05	X	.00	.00	.00	.00	.00
07/21/05	PER PHONE CALL FROM QUALITY CONSTRUCTION STATING MR TURNER					
07/21/05	IS NO LONGER EMPLOYED WITH THEM					
06/17/05	X	.00	.00	.00	.00	.00
06/17/05	INDIVIDUAL FROM WOLF CONST CAME IN OFFICE AND STATED					

CASE NBR-20-030472	DEFENDANT			PLAINTIFF	
AGNBR-482527	TURNER, MICHAEL D.			DSS-STATE	
DATE	PRESIDING JUDGE	PYMT			BAL
06/17/05	MR. TURNER IS NO LONGER EMPLOYED THERE.				
02/09/05	119KNOBEL,	.00	.00	.00	.00 .00
02/09/05	ORDER DATED 02/09/05: 90 DAYS SUSPENDED UPON PMT OF BALANCE				
02/09/05	ON OR BEFORE 02/11/05 IN ADDITION TO A 25.00 COURT COST				
02/09/05	BEFORE 02/11/05.				
01/28/05	X	.00	.00	.00	.00 .00
01/28/05	RTSC SERVED TO JENNIE TURNER-WIFE				
10/26/04	X	.00	.00	.00	.00 .00
10/26/04	ORDER OF DISCHARGE ON 10/22/04.				
10/20/04	119KNOBEL,	.00	.00	.00	.00 .00
10/20/04	ORDER DATED 10/20/04: 90 DAYS DETENTION DEF MAY PURGE UPON				
10/20/04	PMT OF BALANCE ON OR BEFORE RELEASE.				
10/15/04	X	.00	.00	.00	.00 .00
10/15/04	RTSC SERVED TO MRS TURNER -WIFE				
08/26/04	X	.00	.00	.00	.00 .00
08/26/04	NOTICE OF TERMINATION FROM BROOK'S TIRE SERVICE.DOT 08/16/04				

CASE NBR-20-030472 DEFENDANT PLAINTIFF
AGNBR-482527 TURNER, MICHAEL D. DSS-STATE

DATE	PRESIDING JUDGE	PYMT				BAL
03/26/04	128CAIN, T	.00	.00	.00	.00	.00
03/26/04	MOTION AND ORDER TO REDIRECT CHILD SUPPORT PAYMENTS THROUGH					
03/26/04	THE COURT TO THE NON-AFDC RECIPIENT ON 03/26/04.					
02/18/04	128CAIN, T	.00	.00	.00	.00	.00
02/18/04	ORDER DATED 02/18/04: 90 DAYS DETENTION MAY PURGE UPON					
02/18/04	PMT OF $50.00 COURT COST AND $340.67 (INCLUDES COURT FEE)					
02/18/04	BEFOER RELEASE. W/WTH WEAVERS BRAKE SERVICE					
09/17/03	128CAIN, T	.00	.00	.00	.00	.00
09/17/03	90 DAYS SUSPENDED UPON PMT OF 50.00 COST B/10-17-03. DEF TO					
09/17/03	HAVE ZERO BAL B/10-17-03. NO CREDIT FOR GOOD/WORK TIME.					
08/20/03	X	.00	.00	.00	.00	.00
08/20/03	PER PHONE CALL FROM MCGUFFIN'S AUTO THEY STATED MR. TURNER I					
08/20/03	S NOT EMPLOYED THERE.					
07/11/03	ADMISTR	.00	.00	.00	.00	.00
07/11/03	PMTS TO BE 59.57 (5.25 ON ARREARS) WKLY BEG 7-11-03.					

END OF HEARING HISTORY

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 4 - 2011
OFFICE OF THE CLERK

No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

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BOTH 63KHSN

4123 (66)

QUESTIONS PRESENTED

1. Whether the Supreme Court of South Carolina erred in holding—in conflict with twenty-two federal courts of appeals and state courts of last resort—that an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration.

2. Whether this Court has jurisdiction to review the decision of the Supreme Court of South Carolina.

PARTIES TO THE PROCEEDING

The petitioner is Michael D. Turner, the defendant and appellant in the courts below.

Rebecca L. Rogers (formerly Rebecca Price), was a plaintiff and respondent in the courts below, and is a respondent in this Court.

Larry E. Price, Sr. is a respondent in this Court. Price did not appear in the courts below. On November 1, 2010, this Court granted Price's motion to intervene.

The petition named the South Carolina Department of Social Services (DSS) as a respondent. *See* Pet. ii. DSS identified itself as the plaintiff in this case in documents it filed in the South Carolina Family Court, *see* JA 26a, 92a, 101a, and was named as plaintiff or petitioner on the family court docket and several other family court orders and filings, *see, e.g.*, JA 2a, 14a, 17a, 20a, 23a, 28a, 33a, 35a, 38a, 40a, 49a, 52a, 56a, 78a, 81a, 85a, 89a, 94a, 98a, 103a. Although Turner's counsel served the notice of appeal on the Attorney General of South Carolina, *see* JA 66a-67a, DSS declined to appear in the state appellate courts, *see* JA 68a, 72a. DSS filed a brief in opposition to the petition for certiorari in this Court, in which it asserted that it is not a party to this case; however, DSS is listed as a respondent on this Court's electronic docket sheet.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 2

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 4

A. Legal Background 4

B. Factual Background 8

C. Proceedings Below 10

SUMMARY OF ARGUMENT 15

ARGUMENT 18

I. THIS COURT HAS JURISDICTION TO REVIEW THE SUPREME COURT OF SOUTH CAROLINA'S DECISION 18

A. It Would Be Virtually Impossible To Litigate The Validity Of Turner's Contempt Order Before Expiration Of His Jail Sentence 20

B. The Violation Of Turner's Constitutional Right To Appointed Counsel Is Highly Likely To Recur 24

II. TURNER WAS ENTITLED TO APPOINTED COUNSEL 27

TABLE OF CONTENTS—Continued

Page

A. This Court's Precedent Establishes That The Right To Appointed Counsel Applies When An Indigent Defendant Faces Incarceration 27

B. Appointment Of Counsel Is Necessary In Civil Contempt Proceedings To Ensure That The Sanction Maintains Its Civil Character And Purpose 38

C. Fundamental Principles Of Due Process Confirm That An Alleged Contemnor Facing Possible Incarceration Is Entitled To Appointment Of Counsel 42

CONCLUSION 51

TABLE OF AUTHORITIES

CASES

Page(s)

Adams v. *Robertson*, 520 U.S. 83 (1997) 18

Alabama v. *Shelton*, 535 U.S. 654 (2002) 28, 29, 34

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 28, 29, 37, 47

Bloom v. *Illinois*, 391 U.S. 194 (1968) 29, 39

Board of Education of Hendrick Hudson Central School District v. *Rowley*, 458 U.S. 176 (1982) 21

Brasington v. *Shannon*, 341 S.E.2d 130 (S.C. 1986) 7, 45

Burch v. *Louisiana*, 441 U.S. 130 (1979) 19

Burlington Northern Railroad Co. v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987) 24

California Coastal Commission v. *Granite Rock Co.*, 480 U.S. 572 (1987) 24

Carey v. *Piphus*, 435 U.S. 247 (1978) 44

Carlson v. *Landon*, 342 U.S. 524 (1952) 41

Christensen v. *Iowa District Court*, 578 N.W.2d 675 (Iowa 1998) 35

Cohen v. *Cowles Media Co.*, 501 U.S. 663 (1991) 18, 19

Combs v. *Ryan's Coal Co.*, 785 F.2d 970 (11th Cir. 1986) 36

TABLE OF AUTHORITIES—Continued

Page(s)

Cooke v. *United States*, 267 U.S. 517 (1925) 29, 30, 39

County of Los Angeles v. *Davis*, 440 U.S. 625 (1979) 20

Demore v. *Kim*, 538 U.S. 510 (2003) 41

Electric Works Pension Trust Fund of Local Union #58 v. *Gary's Electric Service Co.*, 340 F.3d 373 (6th Cir. 2003) 36

Faretta v. *California*, 422 U.S. 806 (1975) 46

FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 20, 24, 25

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 21, 26

Forest Guardians v. *Babbit*, 174 F.3d 1178 (10th Cir. 1999) 45

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 43

Friends of the Earth, Inc. v. *Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) 20

FTC v. *Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999) 45

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 33, 34, 50

Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 28

Globe Newspaper Co. v. *Superior Court of Norfolk County*, 457 U.S. 596 (1982) 24, 25

Glover v. *Johnson*, 138 F.3d 229 (6th Cir. 1998) 45

Glover v. *United States*, 531 U.S. 198 (2001) 28

Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 38, 39, 40

Green v. *United States*, 356 U.S. 165 (1958) 29

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 43, 44

Heryford v. *Parker*, 396 F.2d 393 (10th Cir. 1968) 32

Hicks ex rel. Feiock v. *Feiock*, 485 U.S. 624 (1988) 36, 38, 39, 40, 45

Hicks v. *Hicks*, 312 S.E.2d 598 (S.C. Ct. App. 1984) 7

Honig v. *Doe*, 484 U.S. 305 (1988) 25, 27

Huber v. *Marine Midland Bank*, 51 F.3d 5 (2d Cir. 1995) 45

In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971) 32

In re Gault, 387 U.S. 1 (1967) 3, 30, 31, 34, 35, 44

TABLE OF AUTHORITIES—Continued

Page(s)

In re Gauvere, 165 S.W.3d 314 (Tex. 2005) 35

In re Oliver, 333 U.S. 257 (1948) 29, 39

In re Power Recovery Systems, Inc., 950 F.2d 798 (1st Cir. 1991) 36

In re Powers, 653 N.E.2d 1154 (N.Y. 1995) 35

In re S.L., 462 A.2d 1252 (N.J. 1983) 32

In re Winship, 397 U.S. 358 (1970) 31

International Union, United Mineworkers of America v. *Bagwell*, 512 U.S. 821 (1994) 38, 39, 40

Jefferson v. *City of Tarrant*, 522 U.S. 75 (1997) 18

Jenkins v. *Director of the Virginia Center for Behavioral Rehabilitation*, 624 S.E.2d 453 (Va. 2006) 32

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 16, 19, 28, 29

Jones v. *United States*, 463 U.S. 354 (1983) 43

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) 40

Lampert v. *Lampert*, 388 N.W.2d 899 (S.D. 1986) 35

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981) 32, 33, 47, 49

TABLE OF AUTHORITIES—Continued

Page(s)

Lebron v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995) 19

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964) 20

Little v. *Streater*, 452 U.S. 1 (1981) 48

Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 26

Lynch v. *Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974) 32

Maggio v. *Zeitz*, 333 U.S. 56 (1948) 36, 37, 39, 40, 45

Maine v. *Moulton*, 474 U.S. 159 (1985) 47

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 43, 48, 49

McBride v. *McBride*, 431 S.E.2d 14 (N.C. 1993) 37

McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 46, 49

McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971) 31

McNeil v. *Director, Patuxent Institute*, 407 U.S. 245 (1972) 40

Middendorf v. *Henry*, 425 U.S. 25 (1976) 33

Miranda v. *Arizona*, 384 U.S. 436 (1966) 19

Moseley v. *Mosier*, 306 S.E.2d 624 (S.C. 1983) 7

Muniz v. *Hoffman*, 422 U.S. 454 (1975) 29

Myers v. *United States*, 264 U.S. 95 (1924) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 20, 22, 25

New York Times Co. v. *Jascalevich*, 439 U.S. 1317 (1978) 18

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 26

Olmstead v. *L.C.*, 527 U.S. 581 (1999) 24

Palmer Oil Corp. v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952) 18

Pasqua v. *Council*, 892 A.2d 663 (N.J. 2006) 36

Pennsylvania v. *Mimms*, 434 U.S. 106 (1977) 23

Powell v. *Alabama*, 287 U.S. 45 (1932) 19, 27, 29, 30, 35, 47

Preiser v. *Newkirk*, 422 U.S. 395 (1975) 20

Press-Enterprise Co. v. *Superior Court of California*, 478 U.S. 1 (1986) 24, 25

Project Release v. *Prevost*, 722 F.2d 960 (2d Cir. 1983) 32

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 25

Ridgway v. *Baker*, 720 F.2d 1409 (5th Cir. 1983) 36, 37

Scott v. *Illinois*, 440 U.S. 367 (1979) 28

SEC v. *Sloan*, 436 U.S. 103 (1978) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Shillitani v. *United States*, 384 U.S. 364 (1966) 37, 39, 40, 41

Sibron v. *New York*, 392 U.S. 40 (1968) 23

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 20, 21

Spartanburg County Department of Social Services v. *Padgett*, 370 S.E.2d 872 (S.C. 1988) 7

Spencer v. *Kemna*, 523 U.S. 1 (1998) 26

St. Pierre v. *United States*, 319 U.S. 41 (1943) 23

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Thornton v. *Thornton*, 492 S.E.2d 86 (S.C. 1997) 36

United States v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) 44

United States v. *Barnett*, 376 U.S. 681 (1964) 29

United States v. *Budell*, 187 F.3d 1137 (9th Cir. 1999) 32

United States v. *Cronic*, 466 U.S. 648 (1984) 47

United States v. *Dixon*, 509 U.S. 688 (1993) 39

United States v. *Frierson*, 208 F.3d 282 (1st Cir. 2000) 32

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Page(s)

United States v. *Rylander*, 460 U.S. 752 (1983) 37, 45

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Vitek v. *Jones*, 445 U.S. 480 (1980) 31, 32, 35, 44, 47

Walker v. *McLain*, 768 F.2d 1181 (10th Cir. 1985) 37, 44

Weinstein v. *Bradford*, 423 U.S. 147 (1975) 20-21

Widman v. *Widman*, 557 S.E.2d 693 (S.C. Ct. App. 2001) 7

Wisconsin Department of Industry v. *Gould Inc.*, 475 U.S. 282 (1986) 21

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 19

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const.
amend. VI 2, 28
amend. XIV, §1 2

18 U.S.C. §4247(d) 32

28 U.S.C. §1257 ..... 1, 15, 18

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C.
§608(a)(2) 4
§608(a)(3) 4, 8
§652 4
§654 4
§656(a) 4
§657(a)(1) 4
§657(a)(2) 4
§666 4

S.C. Code Ann.
§24-13-910 12
§43-5-65(a) 8
§43-5-65(a)(1) 5
§43-5-65(a)(2) 5
§43-5-220(a) 5
§43-5-222 5
§63-3-620 ..... 6, 7, 12, 22, 36
§63-17-390 7
§63-17-750(b) 6

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IN THE

Supreme Court of the United States

No. 10-10

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Supreme Court of South Carolina is reported at 691 S.E.2d 470 (S.C. 2010). Pet. App. 1a-5a. The order of the South Carolina Family Court is unreported. JA 60a-63a.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on March 29, 2010. The petition for a writ of certiorari was filed on June 25, 2010, and granted on November 1, 2010. As discussed below, this Court has jurisdiction pursuant to 28 U.S.C. §1257(a). *See infra* pp. 18-27.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, §1.

PRELIMINARY STATEMENT

Petitioner Michael Turner was incarcerated for twelve months after a South Carolina family court held him in civil contempt of a court order to pay child support for respondent Rebecca Price's (now Rogers') minor child. The contempt order provided that Turner could purge his contempt and gain release from jail if he paid his arrearage in full (nearly $6,000), but Turner, who is indigent, was unable to pay, and he served the full sentence.

Turner was not represented by counsel at the contempt hearing, nor did the court advise him of his right to counsel. Had counsel been appointed, Turner could have made the evidentiary demonstration and legal arguments necessary to establish that he could not pay the thousands of dollars he owed, which, under South Carolina law and this Court's decisions addressing civil contempt, would have been a complete defense precluding his incarceration. Instead, Turner was left to

defend himself (to no avail) and was jailed, in effect, for being too poor to pay.

This twelve-month sentence was neither the first time nor the last that Turner has been incarcerated for failure to pay child support without the aid of counsel. Because Price had received public assistance benefits, she assigned her right to child support to the South Carolina Department of Social Services (DSS), and the child-support enforcement proceedings against Turner became subject to automatic procedures carried out by DSS and the family court. Each time Turner's account fell into arrears, the court was required by law automatically to issue a rule to show cause why Turner should not be held in contempt. Turner has been incarcerated in this manner several times, and so long as he continues to owe unpaid child support, he will continue to face automatic contempt proceedings and the threat of incarceration. Indeed, Turner is presently in jail again for failure to pay child support.

In the decision below, the Supreme Court of South Carolina rejected Turner's argument that he was constitutionally entitled to appointment of counsel at the contempt hearing. Notwithstanding this Court's decisions that have found a right to counsel in both criminal *and* civil proceedings that carry with them the "awesome prospect of incarceration," *In re Gault*, 387 U.S. 1, 36-37 (1967), the court held that the right to counsel applies only in *criminal* contempt proceedings. In reaching that conclusion, the court relied on the assumption that a civil contempt sanction is "conditional" and may be avoided through compliance with the underlying court order. But whether Turner *in fact* had the ability to avoid incarceration by complying with the child-support order—and thus whether he could be sentenced to jail for coercive purposes in a civil proceeding

at all—was the precise question before the family court. As a matter of fundamental fairness, Turner should have been afforded the assistance of counsel to show that he could not. The state court's contrary decision cannot be reconciled with this Court's teachings on the right to counsel, the special character and purpose of civil contempt, or the requirements of due process. This Court should reverse the judgment below.

STATEMENT OF THE CASE

A. Legal Background

This case arises out of efforts by Rebecca Price (now Rebecca Rogers) and the South Carolina Department of Social Services (DSS) to collect child-support payments from petitioner Michael Turner for the support of Turner's and Price's minor child. Child support enforcement cases, like this one, that involve a child or custodial parent who has received public assistance are governed by a mix of state and federal requirements. At the federal level, Part D of Title IV of the Social Security Act requires States that receive federal family assistance grants to establish child-support enforcement procedures that meet federal standards for locating noncustodial parents, establishing paternity, and collecting support payments. *See generally* 42 U.S.C. §§652, 654, 666. In particular, States must require, as a condition for receipt of federally funded public assistance, that custodial parents cooperate in identifying noncustodial parents and assign their support rights to the State, to be enforced until the support payments paid exceed the public assistance received. *See id.* §§608(a)(2), (3), 656(a), 657(a)(1), (2). Once a State's enforcement program meets baseline federal requirements, the State enjoys substantial flexibility in choosing how to enforce compliance with child-support

orders. Common enforcement mechanisms include withholding support payments from an obligor's wages, intercepting state or federal tax refunds or public assistance benefits otherwise payable to the obligor, revoking licenses, and levying liens on obligors' property.

Consistent with federal law, South Carolina requires, as a condition of eligibility, that families applying for public assistance cooperate in locating noncustodial parents and assign to the State any rights to support from a noncustodial parent. *See* S.C. Code Ann. §43-5-65(a)(1), (2). By accepting benefits through the Temporary Aid to Needy Families program (TANF), a custodial parent is deemed to have assigned any such rights to the State, *id.* §43-5-65(a)(1), and the parent is automatically referred to DSS for child-support enforcement services, *id.* §43-5-220(a). In such cases– known as "IV-D" cases because they are subject to Part IV-D of the Social Security Act—DSS takes charge of locating the non-custodial parent, establishing paternity, and obtaining and enforcing a support order through the South Carolina Family Court. Any support payments the non-custodial parent makes are paid to DSS through the clerk of the family court; DSS forwards some or all of the payments to the custodial parent, but may retain a portion as reimbursement for public assistance benefits previously provided by the State. *Id.* §43-5-222.[1]

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[1] Custodial parents who do not receive public assistance may also apply to DSS for "IV-D" services. As in TANF cases, assignment of any right to support is a condition of the application for assistance. The application form alerts applicants that DSS represents the State of South Carolina, not the individual parent. *See* Custodial Parent's Application for Child Support Services 2, http://www.state.sc.us/dss/esed/forms/cp-app.pdf.

Among other enforcement measures, DSS enforces child-support orders in IV-D cases through contempt proceedings in the family court. Under South Carolina law, "[a]n adult who wilfully violates, neglects, or refuses to obey or perform a lawful order of the court," including an order to pay child support, "may be proceeded against for contempt of court." S.C. Code Ann. §63-3-620; *see also id.* §63-17-750(b).[2] Rule 24 of the South Carolina Rules of Family Court provides that the clerk of the court must review child-support accounts in all IV-D cases monthly. Whenever the clerk finds that an account has fallen more than five days in arrears, Rule 24 requires the clerk *sua sponte* to issue an affidavit and rule to show cause why the child-support obligor should not be held in contempt. As assignee of the support rights, DSS may also request the clerk to take various actions to enforce the support order, including by issuing a rule to show cause. *See, e.g.*, JA 64a-65a; *infra* p. 15 n.10.

When the family court issues a rule to show cause, the obligor is required to appear at a contempt hearing, and the clerk's affidavit becomes the basis for establishing the obligor's noncompliance with the underlying child-support order. The affidavit "must identify the court order which the respondent has allegedly violated" and "the specific acts or omissions which

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[2] The contempt statute does not differentiate between civil and criminal contempt. *See* S.C. Code Ann. §63-3-620. An adult found in contempt of court "may be punished by a fine, a public work sentence, or by imprisonment in a local detention facility, or any combination of them, in the discretion of the court, but not to exceed imprisonment in a local detention facility for one year, a fine of fifteen hundred dollars, or public work sentence of more than three hundred hours, or any combination of them." *Id.*

constitute noncompliance." *Brusington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986). If the obligor does not appear at the hearing, the court may issue a warrant for his arrest. S.C. Code Ann. §63-17-390; *see, e.g.*, JA 38a-39a, 81a-84a.

Because South Carolina law defines contempt as the "wilful[] violat[ion]" of a court order, S.C. Code Ann. §63-3-620, contempt may be found only where the defendant acts "'voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" *Spartanburg Cnty. Dep't of Soc. Servs.* v. *Padgett*, 370 S.E.2d 872, 874 (S.C. 1988). Where an obligor is unable to obey a court order without fault on his part, he is not to be held in contempt. In the child-support context, this means that a noncustodial parent who genuinely lacks the resources to make court-ordered child-support payments cannot be held in contempt. *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983); *Hicks* v. *Hicks*, 312 S.E.2d 598, 599 (S.C. Ct. App. 1984). The obligor, however, bears the burden of proving that defense: Once the moving party has established a prima facie case of willful contempt by showing the existence of a court order and the obligor's noncompliance, the burden shifts to the obligor to establish his inability to comply with the underlying order. *See, e.g.*, *Brusington*, 341 S.E.2d at 131; *Widman* v. *Widman*, 557 S.E.2d 693, 705 (S.C. Ct. App. 2001).

The South Carolina contempt statute and family court rules are silent as to whether obligors have a right to counsel (appointed or otherwise) at contempt hearings.

B. Factual Background

B.L.P., a minor child, was born to Rebecca Price in 1996. Price received public assistance for a time, and she accordingly assigned her right to collect child support to DSS, as required by law.[3] In 2003, with Price's cooperation, DSS established that Turner was B.L.P.'s father and moved for a determination of financial responsibility in the Oconee County Family Court. On June 18, 2003, the court entered an Order of Financial Responsibility requiring Turner to make child-support payments of $51.73 per week. Pet. App. 19a, 22a.[4] Although the order recorded Turner's employment status as "unemployed," the court imputed to Turner a gross income of $1,386 per month. Pet. App. 20a-21a.[5] The

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[3] *See* 42 U.S.C. §608(a)(3); S.C. Code Ann. §43-5-65(a). Documents in the family court record in this case thus bear the designation "IV-D," to reflect that the child-support enforcement proceedings are governed by Part D of Title IV of the Social Security Act and corresponding provisions of South Carolina law. While Rebecca Price was identified as the plaintiff on some orders and filings in the family court, DSS is identified as the plaintiff or petitioner on most of the record documents. *See supra* p. ii (citing documents). Counsel for DSS filed motions in the family court on behalf of DSS as "plaintiff," JA 26a, 92a, 101a, and appeared as the plaintiff at a family court contempt hearing at least once, JA 40a.

[4] The Order of Financial Responsibility explains that Turner's child support obligation "shall continue until the child support/arrears are fully paid" and that he "shall pay the amount as ordered until the minor child[] reach(es) the age of emancipation; or, until ... determined by the Court." Pet. App. 22a (emphasis omitted). B.L.P. will turn eighteen in 2014.

[5] The imputed income was calculated according to a standardized formula set by DSS. Pet. App. 25a. This figure was reduced to $1,084 per month to reflect that Turner had other children with Jennie Turner, whom Turner had married in 1999. *Id.* Jennie and Michael Turner have since divorced, and a default Order of

court made Turner's support obligation retroactive to the date of the original child-support negotiation conference. Consequently, from the day the court issued the child-support order, Turner was already more than $200 in arrears. Pet. App. 21a.

For approximately two years, Turner struggled, with some success, to maintain employment and keep up with his child support payments. Pursuant to the automatic procedures of Rule 24, the family court issued four rules to show cause during this period why Turner should not be held in contempt, and Turner was briefly jailed twice for contempt of court. JA 14a-19a, 20a-25a, 28a-32a, 33a-34a. Turner was not represented by counsel during any of these proceedings. As a result of wage-withholding and other payments made on his behalf, Turner's arrearage during those first two years remained below $1,000 and fell to zero on a few occasions. JA 123a-132a.[5]

Financial Responsibility requiring Turner to pay $134.24 per week, including court costs, for the support of Jennie Turner's three children was entered in Turner's absence in November 2009. *See* S.C. Family Court Case No. 2009-DR-37-730.

[5] According to family court records, Turner held a series of jobs, and the court was able to collect child support from some of his employers through automatic wage-withholding. Other payments were also made on Turner's behalf. The record does not indicate who made those payments. *See* JA 123a-132a. Initially, the clerk of the family court forwarded payments made on Turner's behalf to DSS. In March 2004, at DSS's request, the clerk began remitting Turner's payments directly to Rebecca Price, whose public-assistance benefits had terminated. JA 26a-27a. The support order, however, continued to be administered as a IV-D case. By May 2009, B.L.P. had been placed in the custody of Rebecca Price's mother, Judy Price, and the court approved DSS's request that the clerk change the payee to Judy Price and forward

In September 2005, however, after Turner had failed to appear for a prior hearing, the court found Turner in contempt and sentenced him to six months' incarceration. JA 47a-48a; *see also* JA 35a-39a. The sentence was to be suspended if Turner achieved a zero balance on or before his release, JA 48a, but Turner was not able to make the payments. As on all previous occasions, Turner was not represented by counsel at the hearing that led to this six-month sentence. While Turner was in jail, his arrearage mounted. By the time Turner was released in late January 2006 after serving the full six months, his arrearage exceeded $1,900. JA 121a.

C. Proceedings Below

In March 2006, two months after Turner's release from jail on the prior contempt order, the clerk of court issued another rule to show cause why Turner should not be held in contempt. JA 49a-51a. Although Turner's arrearage had been substantially reduced after DSS intercepted certain federal and state tax refunds and benefit payments payable to Turner, *see* JA 57a, Turner still owed about $1,000 in child support. After a hearing in April 2006, the court ordered wage-withholding, JA 52a-55a, but Turner's account remained in arrears, and the court subsequently issued a bench warrant for his arrest, *see* JA 51a. Turner was

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any support payments to DSS. JA 92a-93a. After Judy Price passed away in June 2010, B.L.P. was placed in the custody of respondent Larry E. Price, Sr. At DSS's request, if the family court receives any payments, they are to be forwarded to DSS for Larry Price. JA 101a-102a. Rebecca Price now has child-support obligations for the support of B.L.P. *See* IFP Aff. of Rebecca L. Rogers.

arrested in December 2007 and booked into the Oconee County jail.

On January 3, 2008, Turner appeared in family court for the contempt hearing. By this time, Turner was behind on his child support by $5,728.76. JA 60a; *see also* JA 115a. Turner was not represented by counsel at the hearing, and the court did not advise Turner that he had a right to counsel. At the brief hearing, Turner attempted to explain to the court that he had been unable to meet his support obligation due to a combination of prior incarceration, substance abuse problems, and physical disability:

> The Court: Is there anything you want to say?
>
> Turner: Well, when I first got out [of jail], I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me.

Pet. App. 17a.[7]

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[7] Turner had applied for Supplemental Security Income ("SSI") and disability insurance benefits in August 2007. In his application, Turner stated that he lived at the time with his wife Jennie Turner and their three children; that B.L.P. was also his child; that he received no income other than Social Security and

Without making any findings of fact as to whether Turner was able to pay the $5,728.76 in arrears, the court sentenced Turner to a term of incarceration not to exceed twelve months, the statutory maximum. JA 60a-62a; *see also* S.C. Code Ann. §63-3-620. The court's order provided that Turner could purge himself of the contempt and be released if he paid the balance in full. JA 61a. The court also placed a lien on any Social Security disability or other benefits Turner might receive. *Id.*[8] Turner was committed to the Oconee County jail, where he remained incarcerated for the full twelve months.

Represented by volunteer *pro bono* counsel, Turner filed a notice of appeal from the family court's order. *See* JA 66a-67a. The court of appeals waived Turner's filing fee. Turner argued on appeal that he had a right under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to have the assistance of counsel before the State could incarcerate him. Pet. App. 10a-15a. The Supreme Court of South Carolina, which certified Turner's appeal to itself

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had no assets other than a vehicle valued at $1,500, and that his wife earned approximately $500 per month in unemployment compensation and owned no assets. Jennie Turner provided these documents to the family court prior to Turner's January 3, 2008 hearing. JA 135a-136a.

[8] The contempt order provided that Turner was "work release eligible." JA 62a. Nonetheless, Turner could not and did not participate in work release. Under South Carolina law, the court's notation of eligibility is merely a prerequisite to participation in work release and does not bind the detention center, which conducts additional screening consistent with Department of Corrections regulations. S.C. Code Ann. §24-13-910. Turner did not pass that screening process.

before the intermediate appellate court could act, JA 97a, rejected that argument and affirmed the family court's judgment. Pet. App. 1a-5a.[9]

The state supreme court held that the constitutional right to counsel applies only in criminal contempt proceedings. Pet. App. 2a-4a. "[Imprisonment for] criminal contempt triggers additional constitutional safeguards [including the right to counsel] not mandated in civil contempt proceedings," the court reasoned, because incarceration in criminal cases is "unconditional." Pet. App. 3a. By contrast, civil contempt sanctions are "conditioned on compliance": "A contemnor imprisoned for civil contempt ... hold[s] the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time." Thus, the court held, civil contemnors may be incarcerated without the appointment of counsel. Pet. App. 3a-4a. The state supreme court acknowledged that the majority of courts to have considered the issue have held that indigent defendants in civil contempt proceedings resulting in incarceration do have a constitutional right to appointed counsel. Pet. App. 3a n.2.

By the time the court issued its judgment in late March 2010—over two years after Turner's counsel filed the notice of appeal—Turner had completed his

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[9] Turner's counsel had served the notice of appeal on both Price and the Attorney General of South Carolina, JA 67a, but neither filed a brief in Turner's appeal. Despite DSS's participation as a "plaintiff" in the family court, *see supra* pp. ii, 8 n.3, the Attorney General took the position that the State was not a party to the case and declined to participate in the appeal, JA 72a. The state supreme court decided the case without the State's or Rebecca Price's participation and without oral argument.

twelve-month jail sentence and again been held in civil contempt and jailed. JA 78a-80a, 85a-88a. At that April 2009 contempt hearing, Turner again tried to explain why he could not meet his support obligation:

> The Court: Anything you want to say?
>
> Mr. Turner: No Sir. I just got out [of jail] - I done a year '07 to '08, got out for like four months. I've tried to find a job. I, honest to God, have tried this time. There's no work out there hardly for carpenters. I couldn't find anything, so I been putting in applications in grocery stores, you name it. I've got in applications. I have tried. I've honestly tried this time. That's all I can say. I can't find no work[.]
>
> ...
>
> The Court: Okay. All Right. If there's nothing further, I find the Defendant in willful contempt.

JA 90a. The court sentenced Turner to six months in jail, which Turner could avoid through payment of $2,500, plus 5% of that amount in court costs. JA 86a-87a. Unable to pay, Turner served the six-month sentence—all while awaiting decision on his appeal from the preceding contempt order.

Meanwhile, DSS and the family court instituted proceedings to enforce an Order of Financial Responsibility obligating Turner to pay child support for the children of his former wife, Jennie Turner. *See supra* p. 8 n.5. Days after the Supreme Court of South Carolina issued its decision on Turner's appeal in this case, the family court issued a bench warrant after Turner failed to appear for a show-cause hearing on Jennie

Turner's child-support order. Turner is presently incarcerated on a contempt order arising from those proceedings.[10] As of December 9, 2010, Turner owed $7,114.72 to Jennie Turner. His arrearage as of that date on Rebecca Price's support order was $13,814.72. JA 104a. A rule to show cause issued on May 26, 2010 for failure to pay support to Rebecca Price remains outstanding. JA 98a-100a.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction under 28 U.S.C. §1257 to review the decision of the Supreme Court of South Carolina. That decision constituted a final judgment of the State's highest court conclusively resolving Turner's right-to-counsel claim under the U.S. Constitution.

Although Turner has completed the twelve-month sentence that the family court imposed in the order under review, the case is not moot. Turner faces a reasonable expectation that he will again be incarcerated for civil contempt without appointment of counsel. Indeed, the controversy has already repeated, and given

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[10] DSS had previously requested that the family court issue a rule to show cause in Jennie Turner's support case. *See* Letter from Clay F. Cook, DSS, to Oconee County Family Court, Case No. 2009-DR-37-730 (filed S.C. Fam. Ct. Mar. 22, 2010). Turner failed to appear for the initial hearing on that rule, resulting in the bench warrant. At the hearing on the bench warrant, Turner was represented *pro bono* by the attorney who had filed the appeal on Turner's behalf. Turner's counsel persuaded the court and DSS to impose a suspended jail sentence contingent on Turner's completion of a substance abuse treatment program. Turner did not complete the program, however, and the court issued a warrant for his arrest, leading to his present incarceration.

Turner's indigency, the amount he owes, and the automatic enforcement procedures that apply, it is virtually certain to recur. The contempt sanctions, however, are too short in duration to be subject to complete judicial review before their expiration. Turner's claim is therefore "capable of repetition, yet evading review."

II. Turner was entitled to appointment of counsel at the civil contempt hearing that led to his incarceration. In a wide range of contexts—both civil and criminal—this Court has held that a defendant facing incarceration is entitled to be informed of his right to counsel and, if he cannot afford his own lawyer, to have counsel appointed. These decisions reflect both the profound deprivation of liberty that occurs when an individual is committed to state custody and the "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). These considerations apply with equal force in the civil contempt context, where Turner needed counsel's assistance to show that he could not pay the court-ordered child support and thus could not be incarcerated.

The Supreme Court of South Carolina nonetheless held that the right to counsel applies only in criminal contempt proceedings. Civil contempt sanctions, the court reasoned, are "conditional" sanctions that (in theory) may be avoided through compliance with the underlying court order. But that reasoning holds only where the accused contemnor *in fact* has the ability to comply. Where the defendant lacks the ability to comply, a sentence of incarceration serves no coercive purpose, but becomes purely punitive. And it is well settled that a punitive sanction cannot be imposed in a proceeding that lacks the procedural safeguards

applicable to criminal prosecutions, including the right to counsel. Accordingly, whether Turner *in fact* could comply with the child-support order—and whether the sanction was truly conditional—was the precise issue before the family court. Counsel's assistance was thus necessary not only to show that Turner could not pay, but also to ensure that the proceeding remained appropriately *civil*.

For these reasons, even if this Court's right-to-counsel precedent left any doubt, familiar principles of procedural due process would compel the conclusion that Turner was entitled to appointment of counsel. Turner's interest in freedom from incarceration is unquestionably of profound weight. That interest is not diminished by the purported "conditional" nature of the civil contempt sanction. Where an accused contemnor lacks the ability to comply with the court's order, a civil sentence is in no way "conditional," but results in an absolute deprivation of physical liberty. The risk of such an outcome is heightened by the fact that the civil contempt defendant bears the burden of presenting evidence and legal argument demonstrating his inability to comply, and meeting that burden is far from straightforward. Without counsel's assistance, the risk of an erroneous outcome is indeed high. The State, by contrast, has only a minimal financial interest in refusing to provide counsel, and no interest at all in maintaining a de facto debtors' prison for child-support obligors who genuinely cannot pay.

ARGUMENT

I. This Court Has Jurisdiction To Review The Supreme Court Of South Carolina's Decision

This Court has jurisdiction under 28 U.S.C. §1257(a) to review a "[f]inal judgment ... rendered by the highest court of a State in which a decision could be had," provided that the case presents a "substantial federal question[]." *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952) (per curiam). There is no doubt here that the Supreme Court of South Carolina's decision affirming the family court's order incarcerating Turner was a "final" judgment: no further review or correction is available in any other state tribunal, and no further proceedings are necessary in the state court system for final resolution of Turner's contempt case. *See Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997); *New York Times Co.* v. *Jascalevich*, 439 U.S. 1317, 1319 (1978) (White, J., in chambers) ("[civil contempt] judgment[s] are 'final' ... for purposes of this Court's jurisdiction ... if they have been rendered by the highest court of the State").

Turner's federal claims were also properly pressed before, and passed upon by, the state court. Turner argued in the state appellate court that he had a right to appointed counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution. Pet. App. 10a-15a. The Supreme Court of South Carolina squarely addressed that federal issue. Pet. App. 2a-5a. These facts are sufficient to establish jurisdiction under §1257(a). *See Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997).

In their brief in opposition, respondents suggested only two reasons why this Court might lack jurisdiction. First, respondents argued (Rogers Opp. 22) that

Turner failed to present the federal right-to-counsel question properly in the state courts. This contention clearly fails. Although Turner did not assert a right to counsel before the family court, the state supreme court addressed his federal constitutional claim on the merits and never suggested that Turner had waived his claim as a matter of state law; it also cited no independent state-law ground for its judgment. *See Cohen*, 501 U.S. at 667; *Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979). Moreover, a defendant does not forfeit his constitutional right to appointment of counsel by failing to ask for a lawyer at the hearing that results in his incarceration. Rather, where the right applies, "it is the duty of the court, whether requested or not, to assign counsel for [an indigent defendant]." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932); *see Miranda* v. *Arizona*, 384 U.S. 436, 473 n.43 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). Nor is it reasonably disputable that Turner squarely presented the federal constitutional question to the state appellate court. *See* Pet. App. 10a-15a. Having presented that right-to-counsel claim, Turner is not "limited to the precise arguments [he] made below," but may "make any argument in support of that claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); *see also Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Second, respondents asserted (Rogers Opp. 21-22) that there is no longer a live case or controversy because Turner has served the twelve-month sentence imposed by the order under review. For the reasons discussed below, this fact does not deprive the Court of jurisdiction. Rather, Turner's case is a classic example of a controversy that is capable of repetition, yet evading review.

A. It Would Be Virtually Impossible To Litigate The Validity Of Turner's Contempt Order Before Expiration Of His Jail Sentence

In suits invoking the authority of the federal judiciary, "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). The absence of judicial authority "to review moot cases derives from [this] requirement of Article III." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *see Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000). In general, "a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks omitted). It is well settled, however, that a case does not become moot "simply because the order attacked has expired, if the underlying dispute between the parties is 'capable of repetition, yet evading review.'" *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); *see Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 514-515 (1911); *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ("*WRTL*"). That standard is met where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *WRTL*, 551 U.S. at 462 (internal quotation marks omitted).

The controversy here is a paradigmatic example of a dispute that is "capable of repetition, yet evading review." It involves a short-term order that is "virtually impossible to litigate the validity of ... prior to its expiration," and Turner will, "in all probability[,] be subject to the same kind of order in the future." *Weinstein* v.

Bradford, 423 U.S. 147, 149 (1975); *see also Southern Pac.*, 219 U.S. at 515. The progress of this case amply demonstrates why the prospect of reaching a final decision on the constitutionality of contempt procedures before the sentence is served is remote. Even though the Supreme Court of South Carolina certified Turner's appeal to itself on its own motion, bypassing the intermediate appellate court, Turner still completed his twelve-month sentence—and a subsequent six-month sentence—before the state supreme court issued its decision. And while that court's decision may speed the process of review in a future case raising the same issue, it is unrealistic to believe that in any such case, this Court could also receive briefing, hear argument, and render an opinion before the contempt sentence expired. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978) (eighteen months too short for "complete judicial review" including "plenary review by this Court"). Where, as here, the challenged action is almost certain to run its course before the Court can give the case full consideration, and the evasion of review results from unavoidable circumstances like the passage of time, the controversy "evades review" for purposes of the mootness analysis.[11]

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[11] Orders of less than two years' duration are ordinarily deemed to "evade review." *See, e.g., Southern Pac.*, 219 U.S. at 514-516 (two-year order was a "short term order, capable of repetition yet evading review"); *Wisconsin Dep't of Indus.* v. *Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (expiration of three-year debarment did not render controversy moot); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 186 n.9 (1982) ("[j]udicial review invariably takes more than nine months to complete").

This case is thus similar to *Nebraska Press Ass'n*, where this Court reviewed an order restricting media access during a criminal trial, even though the trial was over and the defendant had been convicted and sentenced by the time the case reached this Court. The Court held that the dispute was capable of repetition because the defendant's conviction could be reversed and a new trial ordered, at which the trial court might enter another order restricting media access. 427 U.S. at 546. The Court further noted that the decision under review would authorize prosecutors to seek similar orders in other cases. *Id.* at 546-547. And the dispute would "evade review" because such orders "are by nature short-lived." *Id.* at 547. The family court's contempt order and resulting incarceration at issue here is similarly short-lived.

In sum, Turner could not have obtained complete judicial review of his constitutional claim prior to the expiration of his jail sentence. Turner's sentence following the contempt order under review here lasted twelve months. By state statute, contempt sentences can last no longer than that, but may be—and in Turner's case, have been—considerably shorter. S.C. Code Ann. §63-3-620; *see, e.g.*, JA 18a, 24a, 32a (90-day sentences); JA 48a, 87a (six-month sentences). Under no reasonably foreseeable circumstances could Turner have obtained plenary review by this Court before those twelve months elapsed, nor will Turner reasonably be able to obtain such review in the future.

It is no answer to contend, as respondents have argued (Rogers Opp. 21-22), that Turner could have requested a stay of his contempt order to prevent the case from becoming moot. In the first place, Turner had no lawyer in the family court to assist him with presenting arguments for a stay to that court—even

assuming a stay might have been available under state law. Turner should not be penalized merely because the state courts did not recognize the very constitutional right that might have assisted him in maintaining a live controversy to secure that right.

Second, this Court has never held that the mere availability of a stay precludes a controversy from satisfying the "capable of repetition, yet evading review" standard. The sole circumstance in which the Court has attached significance to the availability of a stay for mootness purposes has been where a criminal defendant's diligent prosecution of an appeal *saves* a case from mootness notwithstanding expiration of the sentence. *See, e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 51-52 (1968) (case not moot where petitioner had no opportunity to perfect his appeal before completing his sentence). And although the Court once suggested that a defendant who does not move for bail or apply for a stay does not diligently prosecute his appeal, *see St. Pierre* v. *United States*, 319 U.S. 41, 43 (1943) (per curiam) ("petitioner could[] have brought his case to this Court for review before the expiration of his sentence"), that fact does not bear on whether a case evades review. *Cf. Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 n.3 (1977) (per curiam) ("this Court has long since departed from the rule announced in *St. Pierre*"). And Turner could not have sought this Court's review prior to the expiration of his sentence because the state court had not yet issued a final judgment when his sentence expired; thus, no supersedeas could have issued. *See Sibron*, 392 U.S. at 53 n.13 (distinguishing *St. Pierre* on this basis).

B. The Violation Of Turner's Constitutional Right To Appointed Counsel Is Highly Likely To Recur

In a case where the initial controversy has expired, the critical element for Article III purposes is whether there is a "reasonable expectation" that the petitioning party himself "will be subjected to the same action again." *Weinstein*, 423 U.S. at 149; *see WRTL*, 551 U.S. at 463 ("capable of repetition" requires "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party" (internal quotation marks omitted)).[12] In this case, that standard is more than satisfied, because it is virtually certain that Turner will again be incarcerated for civil contempt without appointment of counsel.

Turner is subject to a continuing Order of Financial Responsibility for the support of B.L.P. until B.L.P. turns eighteen. *See* Pet. App. 19a-25a. Turner owes a substantial arrearage on that order—over $13,000, JA 104a—and he is unable to pay that amount.

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[12] *See also Olmstead* v. *L.C.*, 527 U.S. 581, 594 n.6 (1999) ("in view of the multiple institutional placements L.C. and E.W. have experienced, the controversy they brought to court is 'capable of repetition, yet evading review'"); *Burlington N. R.R. Co.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 436 n.4 (1987) (parties "reasonably likely" to find themselves in future disputes); *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 578 (1987) ("likely" that respondent would again be subject to challenged state regulation); *Press-Enterprise Co.* v. *Superior Ct. of Cal.*, 478 U.S. 1, 6 (1986) ("[i]t can reasonably be assumed" that newspaper publisher "will be subjected to a similar closure order"); *Globe Newspaper Co.* v. *Superior Ct. of Norfolk Cnty.*, 457 U.S. 596, 603 (1982) (same).

Moreover, taking Jennie Turner's support order into account, Turner presently owes over $20,000 in unpaid child support. *See supra* p. 15.[13] In South Carolina, under Rule 24, that arrearage automatically requires the clerk of the family court to issue a rule to show cause why Turner should not again be held in contempt.[14]

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[13] Although the time Turner most recently spent in jail resulted from his failure to comply with a different child-support order—in Jennie Turner's case instead of Rebecca Price's—that does not alter the mootness analysis. It is the same controversy, not the precise underlying facts, that must be "capable of repetition." *See WRTL*, 551 U.S. at 463 (rejecting narrow concept of identity and finding that WRTL had "credibly claimed that it planned on running 'materially similar' ... ad[vertisement]s" and there was no reason to believe FEC would "refrain from prosecuting violations of BCRA" (internal quotation marks omitted)). Thus, in *SEC* v. *Sloan*, when the SEC said it would no longer issue certain challenged orders against the respondent and that the case was therefore moot, the Court held the case was capable of repetition because there was a "reasonable expectation" that the respondent would be subject to *similar* orders in the future. 436 U.S. 103, 108-110 (1978). In numerous cases concerning restrictions on media access to criminal trials, this Court has similarly held that such situations qualify as "capable of repetition" because the media could be excluded from similar future cases. *See, e.g., Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (in light of the state supreme court judgment under review, "it is reasonably foreseeable that other trials may be closed by other judges"); *see also Nebraska Press Ass'n*, 427 U.S. at 546; *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377-378 (1979); *Globe Newspapers*, 457 U.S. at 603; *Press-Enterprise Co.*, 478 U.S. at 6.

[14] The likelihood of recurrence does not depend on any "misconduct" on Turner's part. *Cf. Honig* v. *Doe*, 484 U.S. 305, 320 (1988). An arrearage alone is not a willful violation of a support order. If Turner is genuinely unable to pay, that is a complete defense to any finding of willful contempt. *See supra* p. 7. This case is thus easily distinguished from those in which this Court has found that the complaining party would have to repeat his

Thus, there is not only a reasonable expectation, but a virtual certainty that Turner will again face the prospect of incarceration without having counsel appointed to assist in his defense.

South Carolina's practice of incarcerating child support obligors for failure to pay child support following civil contempt hearings at which they are denied appointment of counsel is a "fixed and definite" policy in which Turner has a concrete and cognizable interest. *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974); *see also id.* at 125-127. There is no "reason to believe that [the State] will refrain from" the automatic enforcement of child-support orders through rules to show cause and contempt proceedings. *Bellotti*, 435 U.S. at 775. Nor is there any reason to doubt that the State will continue to wield incarceration as a coercive sanction at show-cause hearings. Indeed, in Oconee County, where Turner is incarcerated, jail time is the default consequence for an obligor held in contempt: The pre-printed Oconee County form, "Order for Contempt of Court," specifically prompts the judge to check either a box for "Defendant is not in contempt of this court," or a box for "Defendant is in contempt of court, *and I order that Defendant be confined to the Oconee County Detention Center.*" JA 53a, 61a, 82a,

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"misconduct" for the circumstances to be "capable of repetition." Indeed, those cases have overwhelmingly involved the commission of crimes. *See, e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 15, 17-18 (1998); *Los Angeles* v. *Lyons*, 461 U.S. 95, 105-106 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974).

86a (emphasis added); *see also* JA 18a, 24a, 31a-32a, 34a, 38a-39a, 47a-48a.[15]

Accordingly, there is ample basis for finding that the violation of Turner's constitutional rights that occurred in the family court below is capable of repetition, but will evade complete judicial review before the expiration of any sentence. Where the requirement of a live "personal stake" is thus met, the case lies within this Court's Article III jurisdiction. *See Honig* v. *Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting).

II. TURNER WAS ENTITLED TO APPOINTED COUNSEL

A. This Court's Precedent Establishes That The Right To Appointed Counsel Applies When An Indigent Defendant Faces Incarceration

In *Powell* v. *Alabama*, 287 U.S. 45 (1932), this Court recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. In a range of proceedings, both criminal and civil, this Court has accordingly held that an indigent defendant facing incarceration is entitled to be advised of his right to counsel and, if he cannot afford an attorney, to have counsel appointed to assist in his defense.

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[15] That Turner was represented on a voluntary, *pro bono* basis in the South Carolina appellate courts by an attorney who thereafter agreed to appear on Turner's behalf at a later contempt hearing on a different support order does not render the case moot. The particular constitutional violation that Turner challenges in this case is the failure of the family court to *appoint* counsel, which neither the family court nor the state appellate courts have done. *See* JA 75a.

In the criminal context, the right to appointed counsel stems in part from the Sixth Amendment's textual guarantee of "the Assistance of Counsel" in "all criminal prosecutions." U.S. Const. amend. VI. The Court has construed this provision to confer a right to appointed counsel in any proceeding that "may end up in the actual deprivation of a person's liberty." *Alabama* v. *Shelton*, 535 U.S. 654, 658 (2002) (internal quotation marks omitted). This understanding of the Sixth Amendment right to counsel reflects "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). Thus, absent a valid waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). Rather, "*any* amount of actual jail time has Sixth Amendment significance." *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (emphasis added); *see also Scott* v. *Illinois*, 440 U.S. 367, 373 (1979).

This Court has recognized, however, that the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. Thus, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Court extended the Sixth Amendment right to counsel to all criminal prosecutions in state courts in which the defendant faced a loss of liberty through the Due Process Clause, holding that the right to counsel is a "fundamental safeguard[] of liberty" that is "essential to a fair trial." *Id.* at 339-345. As the Court had recognized in *Powell*, without the "guiding

hand of counsel," even a defendant who is not guilty "faces the danger of conviction because he does not know how to establish his innocence." 287 U.S. at 69. "That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Johnson*, 304 U.S. at 463. Indeed, the assistance of counsel "is often a requisite to the very existence of a fair trial," *Argersinger*, 407 U.S. at 31, and, accordingly, no defendant should "face[] incarceration on a conviction that has never been subjected to the crucible of meaningful adversarial testing," *Shelton*, 535 U.S. at 667 (internal quotation marks omitted).

Thus, long before this Court held that the Sixth Amendment applies in criminal contempt proceedings, it recognized a right to counsel in criminal contempt proceedings as a matter of due process. *See Cooke* v. *United States*, 267 U.S. 517, 537 (1925); *see also In re Oliver*, 333 U.S. 257, 275 (1948).[16] In *Cooke*, which addressed a criminal contempt proceeding in federal court, the Court held that "[d]ue process of law ... requires that an accused [criminal contemnor] should be

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[16] In several cases considering whether the right to a jury trial applied in criminal contempt proceedings, the Court had rejected the view that criminal contempt constituted a "criminal prosecution" within the meaning of the Sixth Amendment. *See, e.g., Myers* v. *United States*, 264 U.S. 95, 104-105 (1924); *Green* v. *United States*, 356 U.S. 165, 183-187 (1958); *see also United States* v. *Barnett*, 376 U.S. 681, 694-695 & 696 n.12 (1964). Only much later did the Court hold that criminal contempt is to be categorically classified as a criminal prosecution and that accused criminal contemnors thus have a constitutional right to trial by jury for contempts resulting in incarceration of six months or more. *Bloom* v. *Illinois*, 391 U.S. 194, 201-211 (1968); *see also Muniz* v. *Hoffman*, 422 U.S. 454, 475-476 (1975).

advised of the charges and have a reasonable opportunity to meet them," which "includes the assistance of counsel." 267 U.S. at 537.

As these cases demonstrate, the Court's decisions under the Sixth Amendment and the Due Process Clause have focused the right-to-counsel inquiry in criminal cases on both the seriousness of the stakes for the defendant and the defendant's critical need for the "guiding hand of counsel." *Powell*, 287 U.S. at 69. Guided by these same considerations, the Court has held that the right to appointed counsel applies not only to "criminal prosecutions" within the meaning of the Sixth Amendment, but also to proceedings denominated as "civil" where an individual nonetheless faces the prospect of confinement to state custody.

In *In re Gault*, 387 U.S. 1 (1967), the Court relied on the Due Process Clause to require that "in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel, retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." *Id.* at 41. The Court found appointment of counsel "essential" in any juvenile delinquency hearing that could lead to the juvenile's commitment to state custody because such a proceeding "carr[ies] with it the awesome prospect of incarceration in a state institution" and is therefore—despite its civil label—"comparable in seriousness to a felony prosecution." *Id.* at 36-37.[17] Given those stakes, a juvenile needs

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[17] Although respondents have contended (Rogers Opp. 32) that *Gault* "is better understood as resting on the Sixth

counsel "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36 (internal footnote omitted); *see also id.* at 36-37 & 38-40 n.65.

Similarly, in *Vitek* v. *Jones*, 445 U.S. 480 (1980), a plurality of the Court concluded that counsel must be appointed as a matter of due process for a prisoner being considered for transfer to a mental institution because the prisoner retains a liberty interest in being free from involuntary psychiatric treatment. *Id.* at 493-494, 497 (plurality). The Court recognized that "commitment to a mental hospital produces 'a massive curtailment of liberty'" for the "ordinary citizen," *id.* at 491-492, and would constitute a significant deprivation of liberty even for a convicted criminal already serving

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Amendment," the Court expressly grounded its decision in the requirements of due process. *Gault*, 387 U.S. at 14, 41; *see also id.* at 30-31 (delinquency hearing need not "'conform with all of the requirements of a criminal trial,'" but requirements of due process must be satisfied). Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court rejected the dissent's suggestion that *Gault* or the majority's own holding in *Winship* rested on any "assumption that all juvenile proceedings are criminal prosecutions." *Id.* at 359 n.1 (internal quotation marks omitted); *see also id.* at 375-376 (Burger, C.J., dissenting). And in *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), the Court further clarified that juvenile court proceedings are not "criminal prosecutions" within the meaning of the Sixth Amendment, but are subject instead to the fundamental fairness requirement of the Due Process Clause. *Id.* at 541 (plurality) (citing *Gault*); *see also id.* at 551 (White, J., concurring); *id.* at 553 (Brennan, J., concurring in part and dissenting in part). Under that fundamental fairness standard, the Court in *McKeiver* found no right to a jury trial in juvenile delinquency adjudications. *Id.* at 543-551 (plurality); *id.* at 553-555 (Brennan, J., concurring in part and dissenting in part).

a prison sentence, *id.* at 493-494. The Court further noted that prisoners, especially those facing commitment to a mental institution, would likely require the assistance of counsel to protect and exercise their rights. *Id.* at 496-497.[18]

These decisions culminated in the Court's determination in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), that the right to counsel presumptively applies in any proceeding, civil or criminal, that could lead to incarceration. In *Lassiter*, the Court considered whether a parent is categorically entitled to the right to counsel in a proceeding to terminate parental rights. In answering that question in the negative, the Court contrasted such cases with proceedings that involve

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[18] Providing the fifth vote for the judgment in *Vitek*, Justice Powell agreed that the State must provide "qualified and independent assistance" to inmates threatened with involuntary commitment, but disagreed as to whether the assistance thus provided must always include appointment of a licensed attorney. 445 U.S. at 497 (Powell, J., concurring). Following *Vitek*, Congress enacted legislation requiring appointment of counsel for the involuntary commitment of federal inmates. *See* 18 U.S.C. §4247(d); *United States* v. *Frierson*, 208 F.3d 282, 283-284 (1st Cir. 2000). Many States also provide for appointment of counsel in any proceeding that results in involuntary civil commitment, and several courts have recognized that due process requires appointment of counsel in such circumstances. *See, e.g.*, *Project Release* v. *Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) (upholding New York's civil commitment scheme); *Hertford* v. *Parker*, 396 F.2d 393, 396 (10th Cir. 1968) ("[I]nvoluntary incarceration—whether for punishment ... or treatment ... commands ... the guiding hand of counsel[.]"); *see also, e.g.*, *In re Barnard*, 455 F.2d 1370, 1375-1376 (D.C. Cir. 1971); *United States* v. *Budell*, 187 F.3d 1137, 1141 (9th Cir. 1999); *Lynch* v. *Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974); *Jenkins* v. *Director of the Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006); *In re S.L.*, 462 A.2d 1252, 1256 (N.J. 1983).

incarceration or other commitment to state custody. *Id.* at 25-27. Surveying the Sixth Amendment decisions, as well as *Gault* and *Vitek*, the Court found that its "precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel." *Id.* at 26. In particular, the "pre-eminent generalization that emerge[d] from" decades of precedent "is that [the right to counsel] has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.* at 25; *see also id.* at 26-27. In cases involving the threat of incarceration, there is a "presumption" in favor of appointment of counsel, *id.* at 26, because "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel," *id.* at 25.

Thus, at least where the potential for commitment to state custody is at stake, the Court has soundly rejected formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel.[18]

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[18] *Middendorf* v. *Henry*, 425 U.S. 25 (1976), is not inconsistent with these cases. In *Middendorf*, the Court concluded that the right to counsel was not warranted in summary court-martial proceedings leading to confinement. But it did so in light of the special considerations uniquely applicable to the military and because of the "particular deference [the Court owes] to the determination of Congress ... that counsel should not be provided in summary courts-martial." *Id.* at 43. Moreover, the Court emphasized that servicemembers had the right to refuse trial by summary court-martial and be tried instead at a special or general court-martial at which counsel would be provided. *Id.* at 28-29, 46-48.

Nor does *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), detract from the general rule that an indigent litigant facing incarceration

And in both the criminal and civil contexts, the Court has repeatedly premised its decisions on two essential considerations: the weight of the defendant's interest in freedom from incarceration, and the high likelihood that without counsel's assistance, the defendant will be unable to identify, develop, or prove any defense.

As Turner's case illustrates, these two considerations compel the conclusion that civil contempt defendants facing the prospect of incarceration should also be entitled to appointment of counsel. At the contempt hearing, Turner faced "the awesome prospect of incarceration in a state institution," *Gault*, 387 U.S. at 36-37, and indeed served a full year before his statutory-maximum sentence expired. The contempt proceeding,

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is entitled to appointed counsel. In *Gagnon*, the Court decided that a probationer who was previously convicted and sentenced does not have a categorical right to counsel at a subsequent probation revocation hearing. *Id.* at 789-790. While recognizing that counsel would be required in some cases, *id.* at 786-787, 790-791, the Court reasoned that the grounds for revocation would most often be straightforward, such as conviction of another crime, and that introduction of counsel would transform the revocation proceeding from an informal hearing before an administrative board to something more akin to a formal judicial proceeding, *id.* at 787-788. In addition, the Court emphasized that its decision applied only to probationers and parolees whose liberty interests were limited because they had already been convicted of a crime and remained subject to state control. *Id.* at 789 & n.12. Thus, as the Court recently recognized, *Gagnon* merely stands for the proposition that "the [right to counsel] inquiry trains on the stage of the proceedings" where "guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined." *Shelton*, 535 U.S. at 665 (holding right to counsel applicable at proceeding to impose suspended sentence). In this case, there can be no doubt that the relevant proceeding was the family court contempt hearing.

although civil, was accordingly "comparable in seriousness to a felony prosecution" in terms of its consequences for Turner's physical liberty. *Id.*; *see also Vitek*, 445 U.S. at 491 (plurality).

Moreover, Turner (like other accused contemnors in similar circumstances), surely needed "the guiding hand of counsel" to navigate the legal proceedings and assert his defenses and other rights. *Powell*, 287 U.S. at 69. The defense of inability to comply was available to Turner—if he were able to establish it. *See supra* p. 7. As the accused contemnor, however, he bore the burden of proof on the inability-to-comply defense, and mounting that defense is by no means straightforward.

Counsel could have assisted Turner by obtaining and introducing documentary evidence of his employment (including his efforts to obtain employment), his subsistence needs, health, assets, ability to borrow funds, or other evidence relevant to the defendant's ability to comply with the support order.[20] Moreover,

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[20] In some jurisdictions, the obligor is required to demonstrate not only his income, or lack of income, but also that he could not sell assets, obtain credit, or borrow funds from any source. *See, e.g.*, *In re Gauvey*, 165 S.W.3d 314, 315 (Tex. 2005) (contemnor must demonstrate that he had "no source from which he might be expected to obtain [the money required to purge himself of contempt]" (internal quotation marks omitted)); *Christensen* v. *Iowa Dist. Ct.*, 578 N.W.2d 675, 678-679 (Iowa 1998) (obligor is "not free to prioritize [his] financial obligations so as to prefer [his] own creditors over [his] court ordered obligation"); *In re Powers*, 653 N.E.2d 1154, 1158 (N.Y. 1995) (contemnor must offer "credible evidence" of necessity for his alleged expenses); *Lampert* v. *Lampert*, 388 N.W.2d 899, 903 (S.D. 1986) (to establish inability to pay, contemnor must provide to the court a "complete detailed financial [statement]"). The Supreme Court of South Carolina has similarly rejected as unpersuasive an inability to-pay defense based on lack

unlike the lay defendant, counsel is trained in the calling and examining of witnesses. And counsel could have assisted Turner in demonstrating what portion of a child-support arrearage he could pay and what portion is beyond his means. *See also, e.g., Ridgway* v. *Baker*, 720 F.2d 1409, 1415 (5th Cir. 1983); *Pasqua* v. *Council*, 892 A.2d 663, 673 (N.J. 2006). Such an evidentiary showing is critical because the court is not required to credit mere assertions, and if the defendant "offers no evidence as to his inability to comply ... or stands mute," he has not met his burden. *Maggio* v. *Zeitz*, 333 U.S. 56, 75 (1948).

In addition to evidentiary issues, legal issues may arise concerning the scope of the inability-to-comply defense or its application to particular facts. Under South Carolina law, for example, the scope and application of the defense may depend on the meaning of a "wilfull[] violat[ion]." S.C. Code Ann. §63-3-620.[21]

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of income where the obligor held valuable real assets and enjoyed a "'substantial' lifestyle." *Thornton* v. *Thornton*, 492 S.E.2d 86, 90-91, 94-95 (S.C. 1997).

[21] Some courts have held that a defendant's actual inability to comply does *not* provide a defense to coercive civil contempt if the defendant could be said to have induced his own inability to comply or failed to make reasonable efforts to comply. *See, e.g., Electric Works Pension Trust Fund of Local Union #58* v. *Gary's Elec. Serv. Co.*, 340 F.3d 373, 383 (6th Cir. 2003); *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803 (1st Cir. 1991); *Combs* v. *Ryan's Coal Co.*, 785 F.2d 970, 984 (11th Cir. 1986). Whether such decisions accurately characterize the inability-to-comply defense—and whether they can be reconciled with this Court's case law holding that an ostensibly coercive sanction *cannot* be imposed on a defendant whose present inability to comply negates any coercive effect—are complex legal questions that a lay defendant cannot be expected to address. *See Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 638 n.9 (1988) ("Our precedents are clear ... that punishment

Counsel would understand how to identify the relevant legal questions and frame them for the court's consideration, how to argue the application of law to the facts, and how to create and preserve a proper record. When Turner inartfully referred to his economic circumstances at the contempt hearing, in contrast, the family court judge paid no attention and undertook no further inquiry into Turner's ability to pay his child-support arrearage or the willfulness of Turner's contempt. Pet. App. 17a-18a; *see also* JA 90a. The assistance of a lawyer to identify, develop, and establish that defense and present it effectively to the court could have made a significant difference. *See, e.g.*, *Walker* v. *McLain*, 768 F.2d 1181, 1184 (10th Cir. 1985) (assistance of counsel is especially needed where defendant is "attempting to prove his indigency as a defense to willfulness"); *Ridgway*, 720 F.2d at 1415 ("indigent who appears without a lawyer can[not] be charged ... with knowledge that he has [the burden to show inability to comply] nor with an understanding of how to satisfy it"); *McBride* v. *McBride*, 431 S.E.2d 14, 19 (N.C. 1993) (*pro se* contemnors "[do] not know how to prove their inability to pay").

Thus, consistent with this Court's right-to-counsel precedent, the assistance of appointed counsel for an alleged civil contemnor facing incarceration is "requisite to the very existence of a fair trial." *Argersinger*, 407 U.S. at 31.

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may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order."); *see also United States* v. *Rylander*, 460 U.S. 752, 757 (1983); *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Maggio*, 333 U.S. at 72; *infra* pp. 39-41.

B. Appointment Of Counsel Is Necessary In Civil Contempt Proceedings To Ensure That The Sanction Maintains Its Civil Character And Purpose

Without acknowledging this Court's decisions requiring appointment of counsel for indigent individuals facing incarceration, the Supreme Court of South Carolina thought a different rule should apply because Turner was nominally incarcerated pursuant to an order of *civil* contempt. Pet. App. 2a-3a. This reasoning was flawed.

As an initial matter, this Court has recognized that the line between civil and criminal contempt can be "somewhat elusive," *International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 830-831 (1994), and often difficult to apply in practice. *See id.* at 827; *id.* at 845 (Ginsburg, J., concurring). While the distinction between the two classes of contempt is "sound in principle," *Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 632-633 (1988), most contempts "are neither wholly civil nor altogether criminal," *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). "[I]t may not always be easy to classify a particular act as belonging to either one of those two classes," *id.* (internal quotation marks omitted), particularly at the outset of a contempt proceeding when appropriate procedural safeguards must be put into place. The state supreme court in this case thus placed excessive reliance on a categorical distinction that may not reflect actual practice or prove workable in many cases.

Moreover, the fact that there is a constitutionally significant distinction between civil and criminal contempt cuts sharply in *favor* of a right to appointed counsel in both situations. The assistance of counsel is

needed in a civil contempt proceeding that could lead to incarceration precisely to ensure that the proceeding remains civil—*i.e.*, to ensure that the accused is not subjected to a sanction that effectively becomes punitive but that lacks the procedural safeguards that would otherwise apply in a criminal prosecution (including for criminal contempt).

Civil contempt differs from criminal contempt principally in the "character and purpose" of the sanction. *Gompers*, 221 U.S. at 441; *see also Hicks*, 485 U.S. at 631; *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966). The gravamen of civil contempt is its remedial and coercive character: incarceration is remedial, and thus civil, if it coerces the defendant to do the thing required by the underlying court order, for the benefit of the complainant. *Gompers*, 221 U.S. at 441; *Maggio*, 333 U.S. at 67-68; *see also United States* v. *United Mine Workers*, 330 U.S. 258, 302-304 (1947). Criminal contempt sanctions, in contrast, are punitive, intended to vindicate the authority of the court. *Gompers*, 221 U.S. at 441.

The Court has emphasized that sanctions that are punitive in character and purpose may not be imposed in a civil contempt proceeding that lacks the safeguards required in criminal prosecutions, *Bagwell*, 512 U.S. at 826-827, 831, including the right to counsel.[22] Rather, a

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[22] As discussed, this Court has long held that the right to counsel applies in criminal contempt proceedings under the Due Process Clause. *See Cooke*, 267 U.S. at 537; *Oliver*, 333 U.S. at 275. A variety of other procedural protections also apply to non summary criminal contempt proceedings. *See, e.g., United States* v. *Dixon*, 509 U.S. 688, 696 (1993) (double jeopardy); *Hicks*, 485 U.S. at 632 (proof beyond a reasonable doubt); *Bloom*, 391 U.S. at 201-202 (jury trial).

contempt sanction that has a punitive character may be "properly imposed only in a proceeding instituted and tried as criminal contempt." *Gompers*, 221 U.S. at 444; *see also Hicks*, 485 U.S. at 632-635, 638 n.9; *Shillitani*, 384 U.S. at 371; *cf. Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-167, 184 (1963).

Although a court may order incarceration in a civil contempt proceeding that lacks the protections applicable to criminal contempts, it may do so only because, and only when, civil contempt sanctions are coercive and conditional and may in fact be avoided through obedience to the underlying court order. *Bagwell*, 512 U.S. at 826-827. The "conditional" character of civil contempt, on which the Supreme Court of South Carolina based its decision (Pet. App. 3a), thus hinges on the premise that the contemnor actually has the ability to comply with the court order and thereby avoid the sanction. As this Court has recognized, "the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order." *Shillitani*, 384 U.S. at 371 (citing *Maggio*, 333 U.S. at 76); *see also McNeil* v. *Director, Patuxent Inst.*, 407 U.S. 245, 251 (1972). If the contemnor cannot "do the thing required by the order for the benefit of the complainant," the sanction in practice is neither conditional nor coercive. *Gompers*, 221 U.S. at 442. Rather, where a defendant lacks the ability to comply, a sanction of incarceration sounds in criminal contempt—it becomes "purely punitive." *Maggio*, 333 U.S. at 72.

Thus, "punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks*, 485 U.S. at 638 n.9. An alleged contemnor's inability to comply with the court

order therefore not only provides a substantive defense to the charge of willful contempt; it also determines whether the proceeding is appropriately civil, or whether instead the sentence is effectively punitive and therefore may be imposed only in a proceeding that satisfies all the procedural requirements of criminal contempt. Providing counsel to assist an alleged contemnor who faces incarceration to establish his ability or inability to comply is necessary both to ensure a more accurate result, and to ensure that the proceeding is in fact not punitive, but appropriately *civil* in the first instance.[23]

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[23] An erroneous judgment in civil contempt—*i.e.*, incarcerating a contemnor for coercive purposes when coercion is impossible due to the contemnor's inability to comply—thus imposes the precise sanction that could not, by law, be imposed in criminal contempt without the assistance of counsel. This point distinguishes civil contempt from other types of proceedings in which the government proceeds against an individual but which have traditionally been designated as "civil." In the immigration context, for example, appointment of counsel for an indigent respondent facing removal could arguably help him establish his eligibility to remain in the United States; but an erroneous outcome—in which the respondent is found removable on mistaken grounds—does not effectively convert the proceeding from a civil matter to a criminal case where the right to counsel would concededly apply, or render the removal or any associated detention an impermissible criminal punishment. *Cf. Demore* v. *Kim*, 538 U.S. 510, 523 (2003); *Carlson* v. *Landon*, 342 U.S. 524, 537-538 (1952). Moreover, the unique role that appointed counsel can play in preserving the civil character of a contempt proceeding also distinguishes the right to appointment of counsel from other constitutional safeguards the Court has found unnecessary to the adjudication of civil contempts. *See, e.g.*, *Shillitani*, 384 U.S. at 370-371 (conditional nature of the sanction "justifies holding civil contempt proceedings absent the safeguards of indictment and jury").

It is thus no answer to rely, as the Supreme Court of South Carolina did, on the adage that a civil contemnor "hold[s] the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do." Pet. App. 3a. This reasoning ignores the risk that the defendant will be *erroneously* incarcerated for coercive purposes despite his inability to comply with the court order. When such an error occurs, the defendant does not "hold the keys to his cell" because he has no means of complying with the order to obtain release. Appointment of counsel reduces the risk of such error. *See supra* pp. 35-37; *infra* pp. 45-48. Moreover, the state court's reasoning is fatally circular: the court relied on the defendant's presumed ability to purge his contempt to justify the absence of an essential procedural safeguard at the contempt hearing, the very purpose of which was to determine whether the defendant had the ability to purge his contempt. A contempt defendant's ability to comply is essential to the "civil" or "conditional" character of the proceeding and sanction; where that ability is the very thing at issue, the "civil" or "conditional" character of the proceeding cannot be invoked to justify denying the right to counsel to assist the defendant in establishing his inability to comply.

C. Fundamental Principles Of Due Process Confirm That An Alleged Contemnor Facing Possible Incarceration Is Entitled To Appointment Of Counsel

As the foregoing discussion shows, it is the weight of the civil contempt defendant's interest in physical liberty and his need for the assistance of counsel in defending himself—both to ensure a factually correct determination of his ability to comply and to preserve the

"civil" character of the proceeding—that warrant appointment of counsel in civil contempt proceedings that may lead to incarceration. No further analysis is required to resolve the question. Even if the Court were writing on a blank slate, however, balancing those same considerations against the relevant state interests under the familiar rubric of procedural due process would confirm that the State may not incarcerate an indigent civil contemnor without appointing counsel to assist in his defense.

There can be no doubt that an individual has a profound liberty interest in his own physical freedom, and that the guarantee of due process therefore applies to any deprivation of that freedom. *See Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause[.]"). To determine what process is due—here, whether appointment of counsel is required before an alleged civil contemnor may be incarcerated—the Court generally considers three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of [the liberty] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. *Eldridge*, 424 U.S. 319, 335 (1976).

As this Court has recognized, "the interest in being free from physical detention by one's own government"

is "the most elemental of liberty interests." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529-530 (2004); *see also Jones* v. *United States*, 463 U.S. 354, 361 (1983) ("[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection" (internal quotation marks omitted)). Incarceration for civil contempt is just as substantial a deprivation of liberty as it is in any other context. Like the proceedings at issue in *Gault* and *Vitek*, the fact that contempt procedures may be labeled "civil" does not diminish the deprivation. *See Gault*, 387 U.S. at 36-37; *Vitek*, 445 U.S. at 491 (plurality). "[T]he jail is just as bleak no matter which label is used." *Walker*, 768 F.2d at 1183; *see also United States* v. *Anderson*, 553 F.2d 1154, 1156 (8th Cir. 1977) ("Deprivation of liberty has the same effect on the confined person regardless of whether the proceeding is civil or criminal in nature.").

Nor does the "conditional" nature of the civil contempt sanction diminish the weight of the accused contemnor's liberty interest. *Cf.* Pet. App. 3a. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978). The due process inquiry therefore focuses on the "interest of the *erroneously* detained individual." *Hamdi*, 542 U.S. at 530. In the civil contempt context, erroneous deprivation occurs when a "conditional" sentence is imposed for coercive purposes on an alleged contemnor who in fact lacks the ability to comply with the underlying court order and thus cannot effectively be coerced. *See supra* pp. 40-41. When a civil contemnor is *erroneously* jailed—that is, when he lacks the ability to comply—"his liberty interest is no more conditional than if he

were serving a criminal sentence." *Walker*, 768 F.2d at 1184. Rather, the deprivation of his liberty is absolute.

The second *Mathews* factor likewise supports the conclusion that due process requires appointment of counsel for an indigent defendant facing incarceration for civil contempt. The risk that a defendant will erroneously be found in civil contempt and incarcerated without the assistance of counsel—even if he lacks the ability to comply with the court order—is substantial. While it is generally straightforward for a complainant to establish a prima facie case of civil contempt, it can be quite difficult for the alleged contemnor to establish his inability to comply.

The complainant typically needs only to show the existence of a court order and the defendant's failure to comply to establish a prima facie case of civil contempt. *See Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986); *see also, e.g.*, *Glover* v. *Johnson*, 138 F.3d 229, 244 (6th Cir. 1998). That burden is easily met, as it was in Turner's case, by nothing more than an affidavit provided by the clerk of the court. *See supra* pp. 6-7. The defendant, by contrast, bears a heavy burden to establish his inability to comply. *Brasington*, 341 S.E.2d at 131; *see also Rylander*, 460 U.S. at 757-758, 760-761; *Maggio*, 333 U.S. at 75-76. As this Court has described it, the defendant generally must "clearly establish[]" his inability to comply. *Hicks*, 485 U.S. at 638 n.9. In many jurisdictions, even more sweeping requirements apply. *See, e.g.*, *FTC* v. *Affordable Media, LLC*, 179 F.3d 1228, 1242 (9th Cir. 1999) (alleged contemnor must meet his burden "categorically and in detail" (internal quotation marks omitted)); *Huber* v. *Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995) (alleged contemnor must "establish his inability clearly, plainly, and unmistakably"); *Forest Guardians* v. *Babbit*, 174 F.3d 1178,

1192 (10th Cir. 1999) (burden requires "clear and convincing evidence" (internal quotation marks omitted)).

Moreover, as discussed, establishing the inability-to-comply defense may involve complex factual and legal issues and procedural hurdles, mastery of which may prove difficult for even the most intelligent layman. *See supra* pp. 35-37. Without counsel to assist in establishing that defense, there is a greater likelihood that the outcome of the proceeding will be incorrect, and a defendant will be jailed despite lacking any means to make the court-ordered payments. *See McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant"); *Faretta* v. *California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting) ("The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself.").

In the child-support context, alleged contemnors are especially likely to be unable to comply with underlying court orders, unable to afford their own lawyers, and unable to establish any defense without the assistance of counsel. "[M]ost [child support] debt is owed by extremely poor debtors." Office of Child Support Enforcement (OCSE), U.S. Dep't of Health & Human Servs., *Child Support Enforcement FY 2002 Preliminary Data Report* (2003), http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_datareport/; *see also* Sorensen et al., Urban Inst., *Assessing Child Support Arrears in Nine Large States and the Nation* 3, 22 (2007) (70 percent of unpaid support in nine States was owed by obligors earning less than $10,000 per year). And few such individuals are likely to be able to understand, let alone anticipate and satisfy, their burden of

proof. *See* Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 121 (2009); NACDL Cert. Amicus Br. 8-9 (noting that 41% of indigent fathers lack a high school diploma). Their chances of mustering evidence and argument demonstrating their inability to comply are limited. These indigent and undereducated obligors are likely to be "overwhelm[ed]" by the "distressing and disorienting situation" of the contempt hearing. *Lassiter*, 452 U.S. at 30; *see also Vitek*, 445 U.S. at 496 (plurality).

The Court has long recognized the "special value" of the right to counsel in such circumstances as a safeguard against the erroneous deprivation of liberty. *United States* v. *Cronic*, 466 U.S. 648, 653-654 (1984). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Id.* (internal quotation marks omitted); *cf. Maine* v. *Moulton*, 474 U.S. 159, 169 (1985) ("the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding"); *Argersinger*, 407 U.S. at 33-34. As the Court explained in *Powell*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He is unfamiliar with the rules of evidence. ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the

> danger of conviction because he does not know how to establish his innocence.

287 U.S. at 68-69. Here, as discussed, *see supra* pp. 35-37, appointed counsel could assist the alleged contemnor by assembling and introducing evidence and legal argument in support of an inability-to-comply (or other) defense, thereby significantly enhancing the "fairness and reliability" of civil contempt procedures and reducing the risk that an alleged contemnor will be jailed for coercive purposes when there is no prospect of effective coercion. *Mathews*, 424 U.S. at 343. Just as in other contexts where physical liberty is at stake, "the guiding hand of counsel" is indispensable in civil contempt proceedings that could lead to incarceration.

Weighed against Turner's interest in his physical liberty and the assistance that counsel could provide in ensuring a more accurate outcome, the countervailing government interests in refusing appointment of counsel are minimal. State and federal courts surely have an interest in enforcing compliance with their orders. Likewise, in the child-support context, state and federal governments have an important interest in ensuring the support of minor children and strengthening families. *Little* v. *Streater*, 452 U.S. 1, 14 (1981); *see also* OCSE, *Strategic Plan FY 2005-2009*, at 6, http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf. Nonetheless, neither DSS nor any other state or federal entity has an interest in imposing an ostensibly coercive sanction that has no coercive force. Imprisoning a child-support obligor who is too poor to pay in no way advances the State's interest in securing payment of child support. Indeed, incarcerating child-support obligors who genuinely cannot pay their arrearages is counterproductive to the goal of improving child-support enforcement, as few obligors will

earn income while incarcerated; and incarceration of noncustodial parents may well hinder their efforts to obtain employment upon release and impose a serious strain their children and families. Center for Family Pol'y & Prac., et al. Cert. Amicus Br. 20; *cf.* Levingston & Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, Clearinghouse Review J. of Poverty L. & Pol'y 190 (July-Aug. 2007).

Nor does the government's financial and administrative interest in declining to provide counsel outweigh the significant private interests at stake. The State's "pecuniary interest" is "hardly significant enough to overcome private interests as important as those here." *Lassiter*, 452 U.S. at 28; *see also Mathews*, 424 U.S. at 348 ("[f]inancial cost alone is not a controlling weight"). Indeed, South Carolina and other States that deny the right to counsel in civil contempt proceedings unnecessarily spend substantial amounts from the public fisc, with much of the burden falling on municipalities and local law enforcement, to incarcerate individuals ostensibly for coercive purposes even where coercive incarceration is a futile exercise. *See* South Carolina Dep't of Corrections, *Cost Per Inmate, Fiscal Years 1988-2009* (Nov. 19, 2009), http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2009.pdf (noting that South Carolina spent $14,545 per inmate operating prisons in 2009). Moreover, providing counsel for indigent child-support obligors may *advance* the State's interest in reducing the costs and burden of enforcement proceedings, as counsel can more efficiently "steer a defendant through the basic procedures" and "relieve the judge of the need to explain and enforce basic rules of courtroom protocol." *McKaskle*, 465 U.S. at 184; *see also* NACDL Cert. Amicus Br. 21. Finally, numerous other States have

long and successfully provided for appointment of counsel to indigent defendants in civil contempt proceedings where incarceration is at stake, belying any assertion of prohibitive costs or administrative burden.

The result dictated by this Court's right-to-counsel precedent and the nature of civil contempt is thus borne out by the *Mathews* analysis: in civil contempt proceedings the State may not incarcerate the accused contemnor without advising him of his right to representation by counsel and appointing him an attorney if he is unable to afford his own.[24]

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[24] Civil contempt defendants who face the prospect of incarceration have a *categorical* right to appointment of counsel, not merely a case-by-case right that depends on the merit or complexity of the case or the defendant's capacity to speak effectively for himself. *Cf. Gagnon*, 411 U.S. at 787-789. In a civil contempt proceeding that leads to incarceration, the weight of the liberty interest at stake and the need for counsel's assistance are substantial and generally will not vary from one case to the next. By contrast, in *Gagnon*, the Court reasoned that the assistance of counsel would be of limited value in most cases because the grounds for probation revocation is frequently straightforward: either the defendant has admitted the charges against him or been convicted of a separate crime. *Id.* at 787. If the facts of a particular case gave rise to issues that were more complex or difficult to present, however, the Court held that counsel "[p]resumptively ... should be provided." *Id.* at 790-791.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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No. 10-10

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In The

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS
and LARRY E. PRICE, SR.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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QUESTIONS PRESENTED

A child's indigent mother repeatedly appeared *pro se* in a series of civil-contempt actions to enforce a child-support decree against the child's father. At his sixth hearing, the father admitted fault and was confined for civil contempt. His appellate lawyer sought no stay, and he completed serving his twelve-month term of confinement. The questions presented are:

(1) Does this Court have jurisdiction to review the decision of the South Carolina Supreme Court?

(2) In a mother's *pro se* action to enforce a child-support order, does the father have a categorical Sixth or Fourteenth Amendment right to appointed counsel before he can be confined for a limited time for civil contempt?

PARTIES TO THE PROCEEDING

Petitioner Michael D. Turner is the father of B.L.P. and was the defendant and appellant in the courts below. Rebecca L. Rogers (née Price), the mother of B.L.P. and the plaintiff and respondent in the courts below, is a respondent here. Petitioner still owes child-support back payments to Mrs. Rogers.

Because of her poverty, Mrs. Rogers had to relinquish physical custody of B.L.P. to her parents, Judy and Larry E. Price, Sr. Accordingly, in May 2009, the Oconee County Family Court redirected future child-support payments from Mrs. Rogers to Mrs. Price. When Mrs. Price passed away in June 2010, Mr. Price retained sole physical custody of his granddaughter B.L.P., and the family court redirected future child-support payments to him. Thus, Mr. Price is a second named respondent. This Court granted his motion to intervene when it granted certiorari.

Petitioner attempted to add the South Carolina Department of Social Services (DSS) as an additional respondent at the certiorari stage, but DSS declined to intervene. DSS filed a brief with this Court affirming that it did not participate in the proceedings below and is not a party to this appeal. DSS Opp. 1-2. DSS was not a party to the judgment of the South Carolina Supreme Court and has not intervened. The Deputy Clerk of this Court has confirmed that DSS is not a party to these proceedings. *See* S. Ct. R. 12.6.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	vii
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
I. Statutory Background of Child-Support Enforcement	4
A. Voluntary Nonpayment Is a Widespread Problem	4
B. The Child-Support Enforcement Statutory Scheme	5
C. Hidden Income as a Barrier to Child-Support Enforcement	6
II. Facts	8
III. Procedural History	13
Summary of Argument	17
Argument	20
I. This Court Lacks Jurisdiction Because This Case Is Moot	20
A. This Case Became Moot Once Petitioner's Term of Civil Confinement Expired	21

TABLE OF CONTENTS – Continued

Page

B. The Challenged Action Will Not Evade Review and Is Not Likely to Recur 22

II. The Categorical Right to Counsel Under the Sixth Amendment Is Limited to Criminal Prosecutions, Not *Pro Se* Child-Support Enforcement Proceedings 30

A. Potential Loss of Liberty Does Not Turn a Civil Case Into a Criminal Case 31

B. Child-Support Civil-Contempt Proceedings Are Not Criminal Prosecutions 35

C. Extending the Sixth Amendment Right From Criminal to Civil Cases Would Lead Down a Slippery Slope 40

III. Due Process Does Not Create a *Per Se* Right to Appointed Counsel in All Cases That May Result in Confinement, or Even in All Child-Support Civil-Contempt Proceedings 42

A. There Is No Automatic or Presumptive Right to Counsel in All Civil Cases Involving Deprivation of Liberty..... 43

TABLE OF CONTENTS – Continued

Page

B. Historic Civil-Contempt Procedures Enjoy a Strong Presumption of Constitutionality and Do Not Require a Categorical Right to Appointed Counsel to Make Them Fundamentally Fair 46

C. Even If It Applied, the *Mathews* Balancing Test Would Not Support a Categorical Right to Counsel in All Child-Support Civil-Contempt Proceedings 48

1. Fathers' Interests Are Adequately Protected by Straightforward Family Court Procedures 50

2. Mothers', Children's, and the Government's Interests in Fair, Effective Child-Support Enforcement Would Be Disserved by Appointing Counsel for All Nonpaying Fathers 58

IV. While Due Process Provides for Appointing Counsel in Exceptional Cases Where Essential for a Meaningful Opportunity to Be Heard, Neither a Case-Specific Balancing-Test Claim Nor the Acting Solicitor General's Novel Suggestion of Additional Procedures Is Properly Before This Court 62

Conclusion 65

TABLE OF CONTENTS – Continued

Page

Appendices

Notice of Financial Responsibility and Paternity Determination (Mar. 19, 1999) 1a

Handwritten Note of Rebecca Price (May 25, 1999) 7a

Booking Record for Feb. 18, 2004 ..... 8a

Booking Record for Oct. 20, 2004 ..... 9a

Booking Card for Sept. 15, 2005 ..... 11a

Booking Card for Dec. 26, 2007 ..... 12a

Booking Card for Apr. 24, 2009 ..... 13a

Booking Card for Feb. 19, 2010 ..... 14a

Surety Bond (Feb. 21, 2010) 16a

Arrest Warrant J-452853 (Sept. 23, 2009) 17a

Sentence Sheet for case 10-GS-37-610/J-452853 (Nov. 18, 2010) 21a

Arrest Warrant J-452854 (Aug. 24, 2009) 25a

Sentence Sheet for case 10-GS-37-609/J-452854 (Nov. 18, 2010) 29a

Arrest Warrant N-140076 (Feb. 19, 2010) 33a

Sentence Sheet for case 10-GS-37-608/N-140076 (Nov. 18, 2010) 37a

Plea Colloquy for cases 2010-GS-37-608, -609, -610 (Nov. 18, 2010) 41a

List of Tenth Circuit Family Court Child-Support Enforcement Cases Reviewed 56a

TABLE OF AUTHORITIES

Page

CASES

Allen v. *Illinois*, 478 U.S. 364 (1986) 32

Alvarez v. *Smith*, 130 S. Ct. 576 (2009) 22, 29

Ankenbrandt v. *Richards*, 504 U.S. 689 (1992) 47

Anonymous Nos. 6 & 7 v. *Baker*, 360 U.S. 287 (1959) 34

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 64

Becker v. *United States*, 451 U.S. 1306 (1981) 24

Berry v. *Ianuario*, 314 S.E.2d 308 (S.C. 1983) 23

Bessette v. *W.B. Conkey Co.*, 194 U.S. 324 (1904) 35, 37

Black v. *Div. of Child Support Enforcement*, 686 A.2d 164 (Del. 1996) 26

Bloom v. *Illinois*, 391 U.S. 194 (1968) 34

Boyd v. *Justices of Special Term*, 546 F.2d 526 (2d Cir. 1976) 27

Brock v. *Roadway Express, Inc.*, 481 U.S. 252 (1987) 28

Cafeteria & Rest. Workers Union v. *McElroy*, 367 U.S. 886 (1961) 43

Chadwick v. *Janecka*, 312 F.3d 597 (3d Cir. 2002) 36

Cheuning v. *Rogerson*, 29 F.3d 418 (8th Cir. 1994) 40

Colson v. *State*, 498 A.2d 585 (Me. 1985) 26

TABLE OF AUTHORITIES – Continued

Page

Cooke v. *United States*, 267 U.S. 517 (1925) 34

DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 25

Dow Jones & Co. v. *Kaye*, 256 F.3d 1251 (11th Cir. 2001) 24

Dusenbery v. *United States*, 534 U.S. 161 (2002) 47

Duval v. *Duval*, 322 A.2d 1 (N.H. 1974) 26

Ex parte Foster, 565 S.E.2d 290 (S.C. 2002) 62, 63

FEC v. *Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) 28

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) ..... *passim*

Gerstein v. *Pugh*, 420 U.S. 103 (1975) 29, 57, 58

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 31, 32, 33, 34, 62

Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911) ..... *passim*

Goss v. *Lopez*, 419 U.S. 565 (1975) 49

Green v. *United States*, 356 U.S. 165 (1958) 37

Headwaters, Inc. v. *Bureau of Land Mgmt.*, 893 F.2d 1012 (9th Cir. 1989) 24

Hicks ex rel. Feiock v. *Feiock*, 485 U.S. 624 (1988) ..... *passim*

Hudson v. *United States*, 522 U.S. 93 (1997) 42

In re Bart, 82 S. Ct. 675 (1962) 23

In re Calhoun, 350 N.E.2d 665 (Ohio 1976) 26

In re Decker, 471 S.E.2d 459 (S.C. 1995) 23

TABLE OF AUTHORITIES – Continued

Page

In re Gault, 387 U.S. 1 (1967) 45, 46

In re Nevitt, 117 F. 448 (8th Cir. 1902) 35, 37

In re Oliver, 333 U.S. 257 (1948) 34

In re Winship, 397 U.S. 358 (1970) 41, 46

Indiana v. *Edwards*, 544 U.S. 164 (2008) 55

Int'l Union, United Mine Workers of Am. v. *Bagwell*, 512 U.S. 821 (1994) 34, 36, 41

Iowa Prot. & Advocacy Servs., Inc. v. *Tanager*, 427 F.3d 541 (8th Cir. 2005) 24

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 33

Kentucky v. *Stincer*, 482 U.S. 730 (1987) 64

Kirby v. *Illinois*, 406 U.S. 682 (1972) 32, 33

Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) 20

Lassiter v. *Dep't of Soc. Servs.*, 452 U.S. 18 (1981) ..... *passim*

Lewis v. *Cont'l Bank Corp.*, 494 U.S. 472 (1990) 20

Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 27, 28

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 29

Lujan v. *G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001) 43

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 58

Maggio v. *Zeitz*, 333 U.S. 56 (1948) 37, 38, 39, 52

Mann v. *Hendrian*, 871 F.2d 51 (7th Cir. 1989) 27

TABLE OF AUTHORITIES – Continued

Page

Mathews v. *Eldridge*, 424 U.S. 319 (1976) ..... *passim*

McBride v. *McBride*, 431 S.E.2d 14 (N.C. 1993) 26

McDonald v. *City of Chicago*, 130 S. Ct. 3020 (2010) 31

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940) 64

McIntyre v. *McIntyre*, 771 F.2d 1316 (9th Cir. 1986) 47

McNabb v. *Osmundson*, 315 N.W.2d 9 (Iowa 1982) 26

Medina v. *California*, 505 U.S. 437 (1992) 46, 47

Middendorf v. *Henry*, 425 U.S. 25 (1976) 31, 32, 44

Miller v. *Miller*, 384 S.E.2d 715 (S.C. 1989) 15

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 43

Moseley v. *Mosier*, 306 S.E.2d 624 (S.C. 1983) 27

Neb. Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 24

N.Y. City Employees' Retirement Sys. v. *Dole Food Co.*, 969 F.2d 1430 (2d Cir. 1992) 24

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 27

Parham v. *J.R.*, 442 U.S. 584 (1979) 43, 49, 58

Pasqua v. *Council*, 892 A.2d 663 (N.J. 2006) 61

Pennsylvania v. *Mimms*, 434 U.S. 106 (1977) 24, 25

Peters-Riemers v. *Riemers*, 663 N.W.2d 657 (N.D. 2003) 26

Powell v. *Alabama*, 287 U.S. 45 (1932) 33

TABLE OF AUTHORITIES – Continued

Page

Press-Enter. Co. v. *Superior Ct.*, 478 U.S. 1 (1986) 28

Rodriguez v. *Eighth Judicial Dist. Ct. ex rel. Cnty. of Clark*, 102 P.3d 41 (Nev. 2004) 26, 53

Roe v. *Wade*, 410 U.S. 113 (1973) 28

Rothgery v. *Gillespie Cnty.*, 554 U.S. 191 (2008) 32, 33

Rutherford v. *Rutherford*, 464 A.2d 228 (Md. 1983) 26

Sanchez-Mariani v. *Ellingwood*, 691 F.2d 592 (1st Cir. 1982) 26

Sazama v. *State ex rel. Muilenberg*, 729 N.W.2d 335 (S.D. 2007) 26

Scott v. *Illinois*, 440 U.S. 367 (1979) 33

Shillitani v. *United States*, 384 U.S. 364 (1966) 37, 38, 39, 47

Sibron v. *New York*, 392 U.S. 40 (1968) 24

Spencer v. *Kemna*, 523 U.S. 1 (1998) 21, 22, 27, 28

St. Pierre v. *United States*, 319 U.S. 41 (1943) 17, 21, 23, 24, 25

State ex rel. Dep't of Hum. Servs. v. *Rael*, 642 P.2d 1099 (N.M. 1982) 53

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 28

United States v. *Bauer*, 956 F.2d 693 (7th Cir. 1992) 51, 54

United States v. *Halper*, 490 U.S. 435 (1989) 42

TABLE OF AUTHORITIES – Continued

Page

United States v. *Harris*, 707 F.2d 653 (2d Cir. 1983) 54

United States v. *Rylander*, 460 U.S. 752 (1983) 15, 39

United States v. *Taylor*, 8 F.3d 1074 (6th Cir. 1993) 24

Vitek v. *Jones*, 445 U.S. 480 (1980) 44

Walters v. *Nat'l Assn. of Radiation Survivors*, 473 U.S. 305 (1985) 49, 59, 60, 62

Wiggins v. *Rushen*, 760 F.2d 1009 (9th Cir. 1985) 25

Wold Family Farms, Inc. v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719 (S.D. 2003) 26

Wolff v. *McDonnell*, 418 U.S. 570 (1974) 49

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. art. III ..... *passim*

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. XI 2

U.S. Const. amend. XIV, § 1 ..... *passim*

8 U.S.C. § 1362 (2006) 40

18 U.S.C. § 3006A(b) (2006) 54

42 U.S.C. § 653a(a) (2006) 5

42 U.S.C. § 666(a)-(b) (2006) 5, 6, 52

42 U.S.C. § 1983 (2006) 29

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 5

TABLE OF AUTHORITIES – Continued

Page

S.C. Code Ann. § 63-17-1060 (2009) 5

S.C. Code Ann. § 63-17-1210 (2009) 5

S.C. Code Ann. § 63-17-1420 (2009) 5

S.C. Code Ann. § 63-17-2510 (2009) 5

S.C. Code Ann. § 63-17-2710 (2009) 5

RULES

S. Ct. R. 12.6 ii

S. Ct. R. 14.1(a) 64

S. Ct. R. 23 23

Fed. R. Civ. P. 17(c) 45

S.C. App. Ct. R. 241(c) 15, 17, 23

S.C. App. Ct. R. 608(g) 62, 63

S.C. Fam. Ct. R. 2(a) 53

S.C. Fam. Ct. R. 7 53

S.C. Fam. Ct. R. 25 53

OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. Pol'y Analysis & Mgmt. 89 (2001) 7, 10

Rhonda Zingraff, *Extended Executive Summary: The Effects of Differential Court Sanctions on Child Support Payment Compliance* (Jan. 18, 2007) (unpublished manuscript), *available at* http://www.childsupportandthecourt.org/how-to-manual/data.....8

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JURISDICTION

This Court lacks jurisdiction because there is no longer an actual case or controversy as required by Article III of the U.S. Constitution. Since petitioner has completed his term of confinement, this case is moot. In the future, he and other civil contemnors can obtain stays pending appeal, so the merits question presented will not evade this Court's review. *Infra* pp. 20-29.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2, clause 1 of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – [between a State and Citizens of another State;] – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects].

U.S. Const. art. III, § 2, cl. 1 (bracketed material largely repealed by U.S. Const. amend. XI).

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

For nearly eight years, respondent Rebecca Rogers has tried to collect child support from petitioner for their daughter, B.L.P. Wage withholding has failed because petitioner has repeatedly changed jobs and earned unreported income. The one measure that has succeeded in compelling him to pay substantial amounts has been the prospect of confinement for civil contempt. Mrs. Rogers has repeatedly proceeded *pro se* against petitioner for civil contempt, and on four previous occasions he quickly produced many hundreds of dollars to avoid or end confinement.

Mrs. Rogers's plight is common. Millions of custodial parents (usually mothers) and their children depend on child support, and millions of noncustodial parents (usually fathers) willfully avoid paying it, often by working off the books. States have found that civil contempt works as a backstop to induce nonpaying fathers to pay after other measures fail. Fathers who allege indigence often pay what they owe and so avoid confinement.

Child-support civil-contempt proceedings, often brought by *pro se* mothers, are straightforward and informal, so lawyers are unnecessary. They usually turn on simple factual issues of payment history and ability to pay, readily documented by bank statements, pay stubs, and employers' or doctors' notes. Demonstrating inability to pay is akin to the threshold showing of indigence that criminal defendants must make on their own *before* receiving appointed lawyers. The rules of evidence and procedure are relaxed, and motions and third-party witnesses are rare, even in cases with lawyers. When lawyers are involved, they do little that requires legal expertise. Moreover, introducing lawyers would disadvantage *pro se* mothers, tilting what is now a level playing field between two *pro se* litigants. Thus, neither the Sixth Amendment nor due process requires governments to spend large amounts to appoint a lawyer in every case. Such a categorical requirement would not only complicate these informal proceedings but also delay child-support payments for the neediest children.

I. Statutory Background of Child-Support Enforcement

A. Voluntary Nonpayment Is a Widespread Problem

Child support is a "lifeline" for many struggling families. 155 Cong. Rec. S10,706 (2009) (statement of Sen. Kohl). Nearly a quarter of custodial parents and their children live in poverty. U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007*, at 4 (2009). Many depend on child support to make ends meet. Yet noncustodial parents often fail to pay the child support they owe. In 2007, noncustodial parents owed $34.1 billion in child support to 6.4 million custodial parents in the United States. *Id.* at 9. The noncustodial parents paid less than two-thirds of the amount they owed; more than 1.5 million custodial parents – and their children – received nothing at all. *Id.* at 7 tbl.2.

Many nonpaying parents have the means to pay but choose not to. The poverty rate among noncustodial fathers is estimated to be half that of custodial mothers. Maureen A. Pirog & Kathleen M. Ziol-Guest, *Child Support Enforcement: Programs and Policies, Impacts and Questions*, 25 J. Pol'y Analysis & Mgmt. 943, 972 (2006). One study found that "42 percent of nonresident fathers did not pay formal child support and had no apparent financial reason to shirk this responsibility," suggesting "that there are plenty of deadbeats." Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 Soc. Serv. Rev. 420, 422 (2001).

B. The Child-Support Enforcement Statutory Scheme

Recognizing custodial parents' and their children's need for prompt, reliable child-support payments, Congress enacted the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305. That Act requires states to deduct unpaid child support from delinquent parents' tax refunds, allow liens to be imposed on their property, and compel employers to withhold child support from their pay. *Id.* § 3(b) (codified as amended at 42 U.S.C. § 666 (2006)).

As required by federal law, states maintain databases to notify employers if any of their new hires are subject to child-support withholding. *See, e.g.*, S.C. Code Ann. § 63-17-1210 (2009); *see also* 42 U.S.C. § 653a(a) (2006). South Carolina has procedures to withhold delinquent parents' income automatically, revoke their driver's and business licenses, notify credit-reporting agencies of their delinquency, and impose liens on their property. S.C. Code Ann. §§ 63-17-1060, -1420, -2510, -2710 (2009); *see also* 42 U.S.C. § 666(a)-(b) (2006) (requiring these measures).

States and the federal government offer assistance to noncustodial parents who cannot pay. South Carolina, for example, offers employment and training programs to help noncustodial parents fulfill their child-support obligations. *Custody and Visitation*, S.C. Child Support Enforcement, http://www.state.sc.us/dss/csed/vip.htm (last visited Feb. 6, 2011). A noncustodial

parent can also request review and adjustment of his child-support obligation every three years, or sooner if circumstances (like income) have changed substantially. 42 U.S.C. § 666(a)(10) (2006). Additionally, legal aid is available to South Carolina parents seeking to modify child-support orders.[1]

C. Hidden Income as a Barrier to Child-Support Enforcement

Most enforcement mechanisms fail when a noncustodial parent hides his income to shirk his court-ordered child-support obligations. States cannot withhold child-support payments from income that is unreported or unlawful. *See, e.g.*, Mich. Supreme Court, *The Underground Economy* 11-12 (2010). "Many [nonsupporting parents] opt to work in the underground economy at least in part because doing so enables them to shield their earnings from child support enforcement efforts . . . caus[ing] huge shortfalls." *Id.* at 10.

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[1] South Carolina Legal Services offers pro bono assistance at attorney-staffed offices throughout the state. *South Carolina Legal Services Office Locations*, S.C. Legal Services, http://www.sclegal.org/Home/Locations/tabid/211/Default.aspx (last visited Feb. 6, 2011). Assistance with child-support modification is available in person and online. *See Self Represented Litigant Child Support Modification Clinic for Reduction of Child Support*, S.C. Legal Services, http://www.sclegal.org/SideMenu/ForThePublic/FamilyLL/tabid/476/language/en-US/Default.aspx (last visited Feb. 6, 2011) (assisting *pro se* litigants).

Other states and studies report similar problems. *See, e.g.*, Rhonda Zingraff, *The Promise and Peril of Advancing Strategies for a Problem-Solving Court* 4 (Mar. 2010) (unpublished manuscript), *available at* http://www.childsupportandthecourt.org/how-to-manual/data ("[F]or [noncustodial parents] who rely on the underground economy[,] cash is usually gone before any effort to tap it can begin."); Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. Pol'y Analysis & Mgmt. 89, 104 (2001) (describing fathers who "quit their job[s] when they discovered how much of their wages were garnished" and fathers who turned to "under-the-table jobs, selling drugs, stealing, and gambling"); Abdon M. Pallasch, *State's Deadbeat Dads Owe $3 Bil.*, Chi. Sun-Times, Apr. 8, 2007, at A14 (noting that divorce lawyers joke that some fathers come down with "Acquired Income Deficiency Syndrome").

Because hiding income defeats traditional enforcement mechanisms, custodial parents and states sometimes must resort to civil-contempt proceedings. All eighteen states that responded to a recent federal survey reported that civil-contempt proceedings are used to enforce child-support orders, often when other measures fail. *See Compendium of Responses Collected by the U.S. Dep't of Health & Hum. Servs. Office of Child Support Enforcement* (Dec. 28, 2010) [OCSE Survey]. And when civil contempt is necessary, states have found that it works. *Id.* (Kentucky: "it is a highly effective collection tool. . . ."; Minnesota: "collections increase after findings of contempt."; Oklahoma: "it is

effective when nothing else will work and the [parent] is working for cash or in the underground economy."; Oregon: "When we combine contempt actions with a problem solving approach we have seen a 200% increase in collection."); *see also* Rhonda Zingraff, *Extended Executive Summary: The Effects of Differential Court Sanctions on Child Support Payment Compliance* 18, 26 chart 3 (Jan. 18, 2007) (unpublished manuscript), *available at* http://www.childsupportandthecourt.org/how-to-manual/data (finding that confinement for contempt nearly triples percentage of parents making payments in the months after release).

In sum, "[m]any judges . . . report that the prospect of spending [time] in jail often causes obligors to discover previously undisclosed resources that they can use to make child support payments." Mich. Supreme Court, *supra*, at C-2.

II. Facts

Petitioner Michael Turner and respondent Rebecca L. Rogers (nee Price) had a daughter, B.L.P., in July 1996, when he was 19 and she was 17. The pair drifted apart soon after B.L.P.'s birth. Mrs. Rogers retained custody of the child and received state financial assistance to support B.L.P. *See* JA 27a; Pet. App. 19a, 25a.

In January 2003, the South Carolina Department of Social Services (DSS) notified petitioner of his obligation to support his daughter. JA 7a. On June 18, 2003, the Oconee County Family Court entered an Order of Financial Responsibility, requiring him to pay $51.73 per week in child support. Pet. App. 19a,

22a. The order explained how to adjust the obligation if his circumstances changed and warned him that failure to pay could result in confinement for contempt. *Id.* at 23a-24a. Petitioner and Mrs. Rogers consented to and signed the order. *Id.* at 24a. Anticipating that she would receive child support as promised, Mrs. Rogers informed the state that she would no longer need public assistance for B.L.P. as of July 1, 2003. *See* JA 27a. DSS acknowledged that Mrs. Rogers had closed her public-assistance account and moved to have the family court send petitioner's child-support payments directly to her. JA 26a-27a. The court granted the motion. *Id.* Thereafter, DSS was no longer a real party in interest.[4]

Petitioner defaulted on his obligation immediately, paying nothing all summer. By September 17, 2003, he was more than $760 in arrears, even though he had a new job. JA 17a-18a. The family court held him in civil contempt but gave him the opportunity to

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[4] Petitioner repeatedly suggests, incorrectly, that DSS is the real plaintiff in this case. Petr. Br. ii, 8 n.3. But in the one place in the record where petitioner notes that DSS entered an appearance, at a September 14, 2005 hearing, the transcript reflects that the DSS representative did not say a single word. JA 40a-46a. Accompanied by her mother, Mrs. Rogers (known at the time as Ms. Price) argued the case on her own behalf. *Id.* If Mrs. Rogers had not wanted to proceed, the case against petitioner would have been terminated, as it was in 1999 after Mrs. Rogers indicated that she no longer wanted to proceed. In a handwritten note dated May 25, 1999, Mrs. Rogers "[r]e-quest[ed] the case against Michael Turner to be closed." App. 1a-7a.

avoid ninety days' confinement by paying the balance within one month. *Id.* Petitioner, or someone on his behalf, made four payments totaling $1055.57 by the deadline, so he was not confined. JA 131a. This began a pattern in which petitioner avoided making payments until spurred to do so by the prospect of confinement.

Three more times, on February 18, 2004, October 20, 2004, and February 9, 2005, the family court held petitioner in civil contempt, ordering him to be confined for ninety days or until he paid his outstanding child-support obligations. JA 23a-25a, 31a-32a, 33a-34a. Each time, petitioner or someone on his behalf paid the money (totaling $800.67, $884.79, and $587.96, respectively) in the few weeks before and few days after each hearing. JA 129a-130a, 126a, 125a. He was confined for two days in February 2004 and three days in October 2004 and was released each time immediately after satisfying his obligation. App. 8a-10a. He was not confined at all in February 2005.

During these years, petitioner found construction, automotive, and painting jobs. He worked for at least eight different employers between 2003 and 2006: Cape Construction Realty, McGuffin's Auto Service, Weaver's Brake Service, Brook's Tire Service, Wolf Construction, Quality Construction, Tamassee Knob Car Care, and John's Painting. JA 12a, 18a, 24a, 138a, 137a, 137a, 47a, 53a. This pattern of moving from one job to another is common among noncustodial parents seeking to evade their child-support obligations. *See* Waller & Plotnick, *supra*, at 104.

The family court collected some money through wage withholding in 2004 and 2005 but had difficulty tracking petitioner as he changed jobs. In August 2003, the court directed McGuffin's to garnish petitioner's wages, but McGuffin's notified the court that petitioner was not working there. JA 139a. In August 2004, after the family court began wage withholding, Brook's Tire replied that petitioner no longer worked there. JA 138a. In June 2005, Wolf Construction reported that petitioner had moved on; Quality Construction did the same the next month. JA 137a-138a. In April 2006, the court learned that petitioner had been working at John's Painting, but two weeks later could not confirm his employment. JA 136a. After July 14, 2005, the court never successfully collected child support via wage withholding. JA 105a-123a. Petitioner evidently earned enough money to receive a $178 tax refund for the 2007 tax year, but nevertheless did not pay any child support that year. JA 91a, 111a-114a.

Mrs. Rogers grew impatient with petitioner's pattern of dilatory payments. At a September 14, 2005 hearing (which petitioner did not attend), Mrs. Rogers informed the court of petitioner's employment and residence and his habitual nonpayment of child support. JA 41a-45a. She asked whether, given petitioner's pattern of not paying child support, the court would confine him. Judge Timothy Cain demurred because petitioner had not yet been brought to court on a bench warrant and had not had a chance to explain why he had not paid: "I can't say what the

sentence would be without hearing whatever excuse he might have." JA 44a-45a.

After petitioner was brought to court two weeks later, Judge Cain ordered him confined for six months or until he satisfied his child-support obligations. JA 47a-48a. Petitioner paid nothing and was confined until January 25, 2006. JA 121a-122a; App. 11a. Two months later, Mrs. Rogers received $1404 culled from petitioner's government benefits. JA 57a, 121a; Pet. Reply 8 n.2. Between April 2006 and January 2008, only three payments totaling $200 were made on petitioner's child-support obligation, all in August 2006 just after a bench warrant issued. JA 114a-120a, 136a.

After the events directly at issue, petitioner continued to refuse to pay any child support, even though at least in 2009 and 2010 he was making money by selling drugs. In August and September 2009, he sold the prescription drug Xanax to undercover police officers. In February 2010, he was arrested for possessing another prescription drug, Lortab, and was charged on the outstanding warrants from 2009. App. 17a-20a, 25a-28a, 33a-36a. Within three days, he managed to post a $10,000 surety bond. App. 14a-16a. In November 2010, he pleaded guilty to three of the outstanding drug charges, receiving concurrent three-year suspended sentences plus one year's probation for the two Xanax convictions and a six-month suspended sentence for the Lortab conviction. App. 21a-24a, 29a-32a, 37a-54a. Though he was earning income, buying drugs, and able to post the $10,000

surety bond, he did not pay a single dollar in child support in 2009 or 2010. JA 105a-111a; App. 16a.

III. Procedural History

In March 2006, the family court ordered petitioner to show cause why he should not be held in civil contempt. JA 49a-51a. When he made no further payments, the court issued a bench warrant for his arrest on July 7, 2006. JA 51a, 136a. Police did not arrest him until December 26, 2007. JA 65a. On January 3, 2008, petitioner appeared in family court for a contempt hearing. JA 60a.

Neither petitioner nor Mrs. Rogers was represented by an attorney, and petitioner never requested one. *Id.*; Pet. App. 16a-18a. Judge Cain was familiar with his case, having presided over his September 2003, February 2004, and September 2005 contempt hearings. The hearing began with the clerk's recitation that petitioner had made no payments whatsoever for more than sixteen months. Pet. App. 16a-17a. Petitioner then admitted that he had not satisfied his child-support obligation. *Id.* at 17a. He blamed his failure to pay primarily on his illegal drug habit – "do[ing] meth, smok[ing] pot, and everything else" – and secondarily on two months' disability. *Id.* Though he had found the money to buy illegal drugs, he had paid Mrs. Rogers only "a little bit here and there." *Id.* He also admitted that he "done wrong" and "should have been paying and helping her." *Id.*

The court found petitioner in willful civil contempt and ordered him confined for twelve months or until he paid the balance he owed Mrs. Rogers, whichever came first. *Id.* at 18a. Judge Cain also specifically told petitioner that he would be eligible for work release. *Id.* There is no record evidence that petitioner tried to take advantage of work release to satisfy his child-support obligation and no record evidence of wages being withheld between 2006 and 2010. JA 105a-121a.[3]

In January 2008, Oconee County's chief public defender, Derek Enderlin, agreed to represent petitioner pro bono. JA 66a-67a. Counsel appealed the contempt order but failed to seek a writ of supersedeas to stay the family court's order. *Cf.* S.C. App. Ct. R.

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[3] Petitioner asserts that he "could not . . . participate in work release," claiming that he "did not pass [the detention center's] screening process." Petr. Br. 12 n.8. We have tried unsuccessfully to corroborate petitioner's extra-record claim, for which he provides no basis, and conclude that he is mistaken.

The Oconee County Detention Center implemented a work-release program in September 2007. According to the inmate programs coordinator, there is no record that petitioner even asked to be considered for work release. If he had applied, his record of assault and battery and criminal domestic violence, *see* JA 42a, would have led the coordinator to ask more questions. The detention center retains discretion to allow work release even for detainees with records of violent crime. Once a contemnor asks to take part, the coordinator solicits the views of the victim of the offense. Counsel can only speculate about what would have happened in this case, as petitioner never tried to take advantage of this opportunity to free himself. Thus, this Court should disregard petitioner's extra-record claim to the contrary.

241(c)(1)-(2) (authorizing supersedeas "to prevent a contested issue from becoming moot" while on appeal). Petitioner thus remained confined pending his appeal.

Petitioner's brief on appeal, filed four months before the end of his maximum term of confinement, claimed that child-support civil contemnors have a *per se* right to appointed counsel. Pet. App. 15a. It did not contest the family court's finding that petitioner had willfully violated the child-support order. Nor did it dispute the court's "implied finding" that he had not proven inability to pay. *United States* v. *Rylander*, 460 U.S. 752, 760 (1983); *cf. Miller* v. *Miller*, 384 S.E.2d 715, 717 (S.C. 1989) (recognizing South Carolina Supreme Court's authority to make its own findings of fact in family court appeals). Nor did his brief identify any evidence, motions, arguments, or defenses that a lawyer would have offered at the hearing. In other words, it pointed to nothing that a lawyer would have done differently. Nor did it claim that the civil contempt was in fact criminal. Mrs. Rogers never had counsel at any point in the state-court proceedings and filed no brief.[4]

Before the intermediate appellate court could act, the South Carolina Supreme Court certified the case to itself for direct review and affirmed the family

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[4] The South Carolina Attorney General's Office declined petitioner's invitation to file a brief on appeal, noting that the state was not a party to this private domestic dispute. JA 68a, 72a.

court's civil-contempt order. Pet. App. 1a, 4a-5a. It held that defendants facing confinement for civil contempt have no *per se* right to court-appointed counsel. *Id.* at 4a. The court noted a crucial difference between civil- and criminal-contempt proceedings: the former are conditional and remedial, while the latter are unconditional and punitive. A defendant like petitioner has no right to a court-appointed attorney "because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do." *Id.* at 3a. Petitioner's "conditional sentence [was] a classic civil contempt sanction" because he was able to free himself by paying the child support he owed, *id.*, either immediately or through work release. Thus, the criminal-procedure protections of the Sixth and Fourteenth Amendments did not apply, *id.*, including the Sixth Amendment's guarantee of a right to counsel "[i]n all criminal prosecutions." U.S. Const. amend. VI.

While his appeal was pending, petitioner served all twelve months of his civil-contempt confinement. He made no payments after his release, and on April 29, 2009, the family court ordered him confined for another six months unless he began to chip away at his arrears by paying $2500 of the $9250 he owed. JA 85a-88a. He paid nothing and remained confined for about three months. JA 109a-110a; App. 13a.

Meanwhile, Mrs. Rogers could no longer afford to support her daughter. She had to relinquish custody to her parents, respondent Larry E. Price, Sr. and Judy Price. In May 2009, the family court directed

that petitioner's child-support payments be paid to Mrs. Price. JA 92a-93a. Mrs. Price died in June 2010, and Mr. Price, a roofer nearing retirement age who works intermittently, now cares for the girl and three of Mrs. Rogers's other children on his own. *See* U.S. S. Ct. IFP Aff. of Larry E. Price, Sr.; JA 101a-102a. Mrs. Rogers works as a waitress, paying weekly support for her children, and walks five miles to and from work because she cannot afford a car. U.S. S. Ct. IFP Aff. of Rebecca L. Rogers.

As of December 2010, petitioner owed the family more than $13,814 in overdue child support. JA 105a. His last payment was a recaptured tax refund in May 2008. JA 91a, 113a. He has not made regular payments since wages were last withheld in July 2005. JA 105a-123a.

SUMMARY OF ARGUMENT

1. This case is moot. Petitioner completed his twelve-month term of confinement and was released in 2008. Although he secured a lawyer a few weeks after his hearing, at no time during the following eleven months did he seek a stay or supersedeas. South Carolina expressly authorizes writs of supersedeas "to prevent a contested issue from becoming moot" while on appeal. S.C. App. Ct. R. 241(c)(1)-(2). This Court and others have held that litigants must seek stays pending appeal to prevent their cases from becoming moot. *St. Pierre* v. *United States*, 319 U.S.

41, 43 (1943) (per curiam). Petitioner and other litigants can seek stays in the future, ensuring many future cases for this Court's review.

2. Neither the Sixth nor the Fourteenth Amendment guarantees appointed counsel in every case where loss of liberty is possible.

a. By its text, the Sixth Amendment is limited to "criminal prosecutions." It protects criminal defendants against the complexity and power imbalance of criminal prosecution by the government, not against civil proceedings brought by *pro se* mothers. Holding otherwise would blur the venerable distinction between criminal and civil contempt, inviting extension of a host of criminal procedures to various civil cases, such as immigration detentions.

b. Likewise, due process does not require appointing counsel whenever liberty is at stake. On the contrary, this Court has rejected categorical rights to counsel in cases involving probation-revocation hearings, summary courts-martial, and involuntary commitments of children to mental hospitals. Similarly, child-support civil-contempt proceedings do not require counsel across the board. Because these historic contempt procedures implicate federalism concerns and courts' ability to enforce their judgments on behalf of private litigants, they deserve substantial deference and a strong presumption of constitutionality. Thus, appointing lawyers is not required to ensure fundamental fairness in routine child-support civil-contempt cases brought by *pro se* mothers.

Nor does *Mathews v. Eldridge*'s balancing test require appointing counsel in all such cases. 424 U.S. 319, 335 (1976). The factual and legal issues are almost always simple: (1) Did the defendant pay? (2) Could he have paid? They require, at most, straightforward documents such as paycheck stubs and doctors' or employers' notes. These cases rarely involve authentication of evidence, motions, formal discovery, or questioning witnesses, let alone jury trials. The issues are no more complex than those faced by criminal defendants who must prove that they cannot afford counsel *before* receiving appointed counsel. Empirical scholarship finds that appointing counsel makes no significant difference in simple, nonjury litigation.

While civil contemnors have substantial liberty interests, those interests are adequately safeguarded by simple, informal procedures that contemnors can navigate without lawyers. On the other hand, *pro se* mothers and children share commanding interests in obtaining child support quickly through simple procedures on a level playing field. And states have strong interests in making child-support procedures swift and effective, so fathers cannot flout their obligations and leave their children destitute. Empirical evidence confirms that civil contempt works to induce payments, particularly when other measures have failed. Therefore, even if the *Mathews* test applies, it does not require appointing counsel across the board.

c. Rejecting a rigid, categorical right to counsel does not foreclose more tailored remedies in particular cases. Due process may require case-by-case

appointment of counsel in unusually complex cases, as South Carolina law already provides. Likewise, as the United States suggests, procedures other than appointing counsel, such as financial-disclosure forms and more detailed judicial questioning, may improve fairness. Neither issue, however, was litigated below, included within the question presented, or pressed in petitioner's briefs. Thus, the proper course is to dismiss for want of jurisdiction, or else affirm.

ARGUMENT

I. This Court Lacks Jurisdiction Because This Case Is Moot

The judicial power of federal courts is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). There must persist an actual or threatened injury likely to be redressed by a favorable ruling. *Id.* "It is to be presumed that a cause lies outside this limited [federal] jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citation omitted).

Here, since petitioner's term of confinement expired more than two years ago and he faces no collateral consequences, his direct appeal is moot. He seeks

no damages or prospective relief; in fact, nowhere does his brief specify the relief he desires. If he or other contemnors again face contempt, they can obtain stays pending appeal. Thus, the merits question presented will not evade this Court's review.

A. This Case Became Moot Once Petitioner's Term of Civil Confinement Expired

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre*, 319 U.S. at 42. Except where a criminal conviction carries persistent collateral consequences, a direct appeal typically becomes moot once a defendant has served his sentence. *See Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Thus, after the period of confinement expires, an appeal raising constitutional challenges to a contempt finding and confinement is not justiciable. *St. Pierre*, 319 U.S. at 42-43. Once confinement expires, reversal "cannot operate to undo what has been done or restore" the time served. *Id.*

While his appeal was pending, petitioner completed his maximum twelve-month term of confinement and was released. At that point, his appeal became moot. *Id.* at 42. Thus, petitioner's continued litigation "is no longer embedded in any actual controversy about [his] particular legal rights" and "falls outside the scope of the constitutional words 'Cases'

and 'Controversies.'" *Alvarez* v. *Smith*, 130 S. Ct. 576, 580-81 (2009).

B. The Challenged Action Will Not Evade Review and Is Not Likely to Recur

Petitioner errs in claiming that the civil-contempt proceeding at issue falls within the capable-of-repetition-yet-evading-review exception to the mootness doctrine. Br. 19-27. This exception "applies only in exceptional situations" where (a) the action challenged cannot be litigated fully before it expires or ends; and (b) the complainant is reasonably likely to suffer the same action again. *Spencer*, 523 U.S. at 17 (internal quotation marks omitted). The archetypal case involves a plaintiff seeking prospective relief to prevent an injury in a factual context that cannot be stayed. As a defendant appealing an order that could have been stayed but was not, petitioner does not satisfy his burden of proving that either condition applies.

a. First, petitioner posits that "[i]t [w]ould [b]e [v]irtually [i]mpossible [t]o [l]itigate" an uncounseled civil-contempt finding before the civil confinement expired, guaranteeing that it will *always* evade review. Br. 20. That assertion mistakenly assumes that (i) the order of confinement cannot be stayed pending appeal; and (ii) the test for evading review focuses exclusively on petitioner's ability to challenge

the action, excluding others similarly situated who could bring challenges.

i. Any contemnor can seek a writ of supersedeas to stay his confinement pending appeal. Such writs generally issue upon a party's application when needed "to prevent a contested issue from becoming moot." S.C. App. Ct. R. 241(c)(1)-(2); *see, e.g.*, *Berry* v. *Ianuario*, 314 S.E.2d 308 (S.C. 1983) (granting supersedeas to keep parental-rights-termination appeal from becoming moot); *In re Decker*, 471 S.E.2d 459, 461 (S.C. 1995) (granting supersedeas to stay civil-contempt order pending state supreme court's review of unsettled issues). Upon petitioner's request, a South Carolina court could have issued a supersedeas to keep this case alive at least through the South Carolina Supreme Court. At that point, contrary to petitioner's suggestion that this Court lacked power to intervene (Br. 23), a Justice of this Court could have issued a stay or supersedeas. S. Ct. R. 23.

This Court has specifically held, in the contempt context, that litigants must use this procedural tool to prevent mootness. *See St. Pierre*, 319 U.S. at 43 (noting that petitioner "did not apply to this Court for a stay or a supersedeas" and that in the future "the questions which he seeks to raise here may be preserved by . . . the grant of a stay or a supersedeas, for which he may apply to this Court if necessary"); *see also In re Bart*, 82 S. Ct. 675, 675-76 (1962) (Warren, C.J., in chambers) (staying civil-contempt commitment pending appeal, to prevent case from becoming moot upon petitioner's serving the maximum

term of commitment); *Becker* v. *United States*, 451 U.S. 1306, 1312 (1981) (Rehnquist, J., in chambers);[5] *cf. Sibron* v. *New York*, 392 U.S. 40, 53 & n.13 (1968) (treating challenge to expired sentence as not moot because "there [was] no procedure of which [petitioner] could have availed himself to prevent the expiration of his sentence long before this Court could hear his case," as state statute "cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal").

Petitioner errs in suggesting that *St. Pierre*'s requirement of seeking a stay is no longer good law. Br. 23. He quotes *Pennsylvania* v. *Mimms* for the proposition that "'this Court has long since departed from the rule announced in *St. Pierre*.'" *Id.* (quoting *Mimms*, 434 U.S. 106, 109 n.3 (1977) (per curiam)). But the cited footnote in *Mimms* rejected only *St. Pierre*'s requirement that convicted criminal defendants prove the collateral consequences of criminal convictions to avoid mootness (319 U.S. at 43); it said

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[5] *See also Iowa Prot. & Advocacy Servs., Inc.* v. *Tanager*, 427 F.3d 541, 544 (8th Cir. 2005) ("Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review" (internal quotation marks omitted)); *N.Y. City Employees' Retirement Sys.* v. *Dole Food Co.*, 969 F.2d 1430, 1435 (2d Cir. 1992) (same); *Headwaters, Inc.* v. *Bureau of Land Mgmt.*, 893 F.2d 1012, 1016 (9th Cir. 1989) (same); *Dow Jones & Co.* v. *Kaye*, 256 F.3d 1251, 1256-58 (11th Cir. 2001) (distinguishing *Neb. Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) (discussed at Petr. Br. 22), because the Nebraska Press Association had sought a stay within nine days); *United States* v. *Taylor*, 8 F.3d 1074, 1077 (6th Cir. 1993).

nothing about *St. Pierre*'s distinct requirement that litigants seek stays. The very next sentence from *Mimms*, which petitioner omits, explained: "These more recent cases have held that the possibility of a criminal defendant's suffering 'collateral legal consequences' from a sentence already served permits him to have his claims reviewed here on the merits." 434 U.S. at 109 n.3. *Mimms* nowhere mentioned stays or supersedeas.

While represented by counsel, petitioner failed to seek a stay or supersedeas when he filed his appeal on January 24, 2008 or any time during the following eleven months. When his civil confinement expired, his case became moot.

ii. In addition, the evading-review analysis focuses not just on this litigant, but on whether *all such claims* by *all potential litigants* will necessarily evade review, such that the claim could never be heard. Even if petitioner could not litigate his claims in a later case, others can raise the same issue in similar suits. In *DeFunis* v. *Odegaard*, petitioner challenged an allegedly discriminatory law-school admissions policy. 416 U.S. 312 (1974). Because he was about to graduate from the school, this Court dismissed the case as moot. If the issue recurred, another litigant could bring "a subsequent case attacking those procedures . . . with relative speed to this Court, now that the Supreme Court of Washington has spoken." *Id.* at 319. Thus, the "exceptional" capable-of-repetition-yet-evading-review doctrine did not apply. *Id.*; *see also Wiggins* v. *Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985)

(Kennedy, J.) (rejecting evading-review allegation because other litigants could raise the same merits claim in the future); *Sanchez-Mariani* v. *Ellingwood*, 691 F.2d 592, 595 (1st Cir. 1982) (Breyer, J.) (same).

Likewise, there is no reason to assume that another appeal claiming a right to counsel in civil-contempt proceedings will not come to this Court as a live controversy. Courts frequently grant stays of confinement pending appeal to child-support and other civil contemnors.[4] Other cases involving stays will offer live controversies for this Court's review.

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[4] *See, e.g.*, *Rodriguez* v. *Eighth Judicial Dist. Ct. ex rel. Cnty. of Clark*, 102 P.3d 41, 45 (Nev. 2004) (contempt order stayed and defendant released pending review); *Peters Riemers* v. *Riemers*, 663 N.W.2d 657, 662 (N.D. 2003) (noting that trial judge had stayed second contempt order); *Wold Family Farms, Inc.* v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 722 (S.D. 2003) (appellate court granted *pro se* motion staying contempt order pending appeal), *overruled on other grounds by Sazama* v. *State ex rel. Mutlenberg*, 729 N.W.2d 335, 343 (S.D. 2007); *Black* v. *Div. of Child Support Enforcement*, 686 A.2d 164, 167 (Del. 1996) (family court postponed ruling on contempt order pending answer of a certified question); *McBride* v. *McBride*, 431 S.E.2d 14, 15 (N.C. 1993) (defendant released pending appeal); *Colson* v. *State*, 498 A.2d 585, 586 (Me. 1985) (court stayed commitment order pending appeal); *Rutherford* v. *Rutherford*, 464 A.2d 228, 232 n.3 (Md. 1983) (circuit court stayed enforcement of contempt order pending appeal); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 10-11 (Iowa 1982) (court suspended contempt confinement pending motion and certiorari); *In re Calhoun*, 350 N.E.2d 665, 667 (Ohio 1976) (declining to find case moot because appellant had been released on his own recognizance pending appeal and was thus still under restraint); *Duval* v. *Duval*, 322 A.2d 1, 2 (N.H. 1974) (contempt order stayed pending appeal).

b. Moreover, petitioner cannot show that he will likely be confined again without having had counsel. "[I]t is a matter of speculation whether [petitioner] will again [even] find himself prosecuted for contempt unless he deliberately violates the [child-]support order," and a nonsupporting father cannot establish jurisdiction by announcing a plan "to flout the order." *Mann* v. *Hendrian*, 871 F.2d 51, 53 (7th Cir. 1989) (Posner, J.) (rejecting Article III standing to challenge fully served child-support contempt confinement).[*] This Court should instead presume that petitioner will make good-faith efforts to pay whatever he can toward his child-support obligations. If he "pa[ys] each week as much child support as he c[an] afford," even if it is less than the full amount owed, he cannot be held in contempt. *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983).

Furthermore, Mr. Enderlin represented petitioner at the April 2010 hearing and before this Court. Thus, it is far from certain that petitioner will face another civil-contempt hearing *pro se*. *See Boyd* v. *Justices of Special Term*, 546 F.2d 526, 527 (2d Cir. 1976) (per curiam) (dismissing as moot constitutional claim of right to appointed counsel after plaintiffs found pro bono counsel).

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[*] *Cf. Spencer*, 523 U.S. at 15-17; *Los Angeles* v. *Lyons*, 461 U.S. 95, 106-07, 110 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974).

c. The capable-of-repetition-yet-evading-review rule "applies only in exceptional situations." *Spencer*, 523 U.S. at 17 (internal quotation marks omitted). This Court has applied it in specific substantive areas where disputes are necessarily time-limited and disclaiming jurisdiction would foreclose resolving constitutional issues – particularly those involving elections, abortions, suits by the press, and challenges to administrative orders. *See, e.g.*, *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462-63 (2007) (electioneering restriction); *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (plurality opinion) (challenge to preliminary order); *Press-Enter. Co.* v. *Superior Ct.*, 478 U.S. 1, 6 (1986) (media access to pretrial transcript); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (abortion).

These classes of cases (1) seek prospective redress and (2) cannot be stayed. Pregnancies cannot be stayed. Realistically, neither can elections. Administrative review of preliminary orders does not necessarily stay those orders. *See, e.g.*, *Brock*, 481 U.S. at 255. Criminal trials cannot be stayed pending media appeals without interfering with defendants' speedy-trial rights. *Cf.* Petr. Br. 22.

Here, in contrast, petitioner seeks an advisory opinion. There is no obstacle to staying civil-contempt confinement, and petitioner pleads no prayer for prospective redress or even damages. Vacatur of his contempt finding would afford him no tangible benefit, as it "cannot conceivably remedy any past wrong." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83,

108 (1998). Petitioner cites no case, and we have found none, where the capable-of-repetition exception has been applied to a direct appeal from an order of confinement seeking only retroactive relief, such as vacatur.

d. Petitioner asks this Court, in effect, to ignore its usual mootness rules in order to avoid "penaliz[ing]" him for lacking counsel in the trial court. Br. 23. But petitioner had counsel during eleven months of his twelve-month confinement; counsel could have sought a stay pending appeal. Petitioner and other contemnors can do so in the future (and he is now on notice that such stays are available).

Moreover, mootness is not a penalty for a litigant's behavior, but rather a structural limit on "[t]he judicial Power" under Article III. The case-or-controversy requirement "preserves the vitality of the adversarial process" by ensuring a continuing "stake in the outcome" and an appropriately "proper, limited role" for the federal judiciary. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment). Other live cases will continue to present more concrete vehicles for reviewing the right-to-counsel issue.[8]

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[8] Furthermore, petitioner and other contemnors can prevent the issue from evading review by litigating their claims through other avenues, such as § 1983 suits and class actions, which enjoy relaxed mootness rules. *See Alvarez*, 130 S. Ct. at 580; *Lyons*, 461 U.S. at 109; *Gerstein* v. *Pugh*, 420 U.S. 103, 110-11 n.11 (1975).

II. The Categorical Right to Counsel Under the Sixth Amendment Is Limited to Criminal Prosecutions, Not *Pro Se* Child-Support Enforcement Proceedings

The text of the Sixth Amendment provides: "In all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI (emphasis added). Petitioner attempts to apply this Court's rulings in a host of Sixth Amendment cases to this civil case, wrenching their language out of their criminal context. Only criminal defendants enjoy a categorical right to counsel to protect them from oppression by state prosecutors seeking to brand them criminals. As its text makes clear, the Sixth Amendment right flows from the complexity and imbalance of power "[i]n all criminal prosecutions," not just from potential loss of liberty. The remedial civil-contempt hearing below was not a criminal prosecution.

Petitioner cannot convert a civil proceeding into a criminal one *ex post* simply by alleging that criminal procedures might have reduced the risk of error. This Court should reject petitioner's effort to disregard the civil/criminal line and slide down a slippery slope that could require extending a host of criminal procedures to civil cases.

A. Potential Loss of Liberty Does Not Turn a Civil Case Into a Criminal Case

The Sixth Amendment is expressly limited to "criminal prosecutions." The Due Process Clause incorporates the Sixth Amendment completely against the states, including its limitation to criminal cases. *See McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3034-36 & n.12 (2010) (interpreting *Gideon* v. *Wainwright*, 372 U.S. 335, 341, 343 (1963)).

1. This Court has previously rejected petitioner's argument that the Sixth Amendment requires the appointment of counsel whenever a person may lose his liberty. For instance, in *Middendorf* v. *Henry*, this Court refused to apply the Sixth Amendment to summary courts-martial that could result in thirty days' confinement at hard labor. 425 U.S. 25, 34-35 (1976). *Middendorf*'s reasoning was not narrowly confined to military proceedings, but repeatedly embraced civilian ones as well. "[E]ven in a civilian context the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment." *Id.* at 37; *accord id.* at 35. A civilian proceeding that results in loss of liberty does not trigger the Sixth Amendment's guarantee of counsel, as long as it has some elements that "sufficiently distinguish it from a traditional civilian criminal trial." *Id.* at 38. Like a child-support civil-contempt hearing, a summary court-martial is "procedurally quite different from a criminal trial." *Id.* at 40. Both are "brief, informal hearing[s]," so defense lawyers

are not needed to make them fundamentally fair. *Id.* at 45; *accord id.* at 40-41. The "touchstones" of Sixth Amendment analysis include the complexity and formality of proceedings, *id.* at 40-41, not simply loss of liberty. *See also Allen* v. *Illinois*, 478 U.S. 364, 372-74 (1986) (noting that involuntary civil commitment of sexual predators "does not itself trigger the entire range of criminal procedural protections" because it is not criminal).

The Sixth Amendment cases cited by petitioner (Br. 27-30) all presuppose a criminal prosecution. These cases hold only that loss of liberty is a *necessary* condition for a right to appointed counsel in criminal cases, not a *sufficient* one in noncriminal cases. They do not suggest that the Sixth Amendment right applies beyond its criminal ambit, let alone to a *pro se* mother's enforcement of a child-support order against a nonsupporting father.

2. Though petitioner claims that this Court "reject[s] formalistic distinctions between criminal and civil proceedings" (Br. 33), the Sixth Amendment's textual limitation to adversarial criminal prosecutions "is not 'mere formalism.'" *Rothgery* v. *Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). It recognizes the need to check the awesome power of government prosecutors before they brand citizens criminals. Governments "quite properly spend vast sums of money to establish machinery to try defendants accused of crime" and to hire "[l]awyers to prosecute" them. *Gideon*, 372 U.S. at 344. Complex rules of

evidence and pleading at jury trials require lawyers to navigate their intricacies. *Id.* at 344-45 (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)).

"[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*" *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938) (emphasis added). Petitioner twice quotes the first half of this sentence but omits the crucial italicized phrase. Br. 16, 28. The Sixth Amendment right thus does not attach until "the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery*, 554 U.S. at 198 (quoting *Kirby*, 406 U.S. at 689 (plurality opinion)). Without defense lawyers, criminal defendants would oppose professional state prosecutors alone, within a complex procedural and evidentiary system.

Even though the Sixth Amendment applies to "all criminal prosecution[s]," this Court has limited the right to appointed counsel to prosecutions in which actual imprisonment is imposed. *Scott* v. *Illinois*, 440 U.S. 367, 373-74 (1979). This Court crafted the actual-imprisonment limitation because of prudential concerns about "workab[ility]," "confusion," and "unpredictable, but necessarily substantial, costs." *Id.* at 373.

Petitioner seeks to turn this Court's Sixth Amendment jurisprudence on its head. He urges this Court to disregard the Sixth Amendment's and *Gideon*'s explicit requirement of a criminal prosecution. Instead, he asks this Court to convert the actual-imprisonment *limitation* on Sixth Amendment rights into a wellspring of new, atextual constitutional rights for civil litigants. This Court should reject his invitation to disregard the Sixth Amendment's text.[9]

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[9] This Court has long recognized "[c]riminal contempt [as] a crime in the ordinary sense." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968). Because criminal-contempt defendants face state prosecution and the danger of imbalanced, oppressive proceedings, this Court has interpreted due process in accordance with the Sixth Amendment as forbidding state interference with a criminal-contempt defendant's use of retained counsel. *In re Oliver*, 333 U.S. 257, 259, 275 (1948); *Cooke* v. *United States*, 267 U.S. 517, 537-38 (1925) (noting that trial court had brought in federal prosecutor because the case was criminal but had "refused [the criminal contemnor] time to secure and consult counsel"); *see also Int'l Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 826 (1994) (interpreting *Cooke* as recognizing the right to counsel because it was a criminal case); *Anonymous Nos. 6 & 7* v. *Baker*, 360 U.S. 287, 294-95 (1959) (interpreting *Oliver* as recognizing "a constitutional right to counsel in a criminal contempt proceeding, growing out of a state investigation"). Petitioner errs in seeking to extend these criminal-contempt precedents to require appointed counsel for civil contemnors. Petr. Br. 29-30.

B. Child-Support Civil-Contempt Proceedings Are Not Criminal Prosecutions

1. "Criminal contempt proceedings, *unlike civil proceedings*, could require such protections as the Sixth Amendment right to counsel. . . ." 27 James Wm. Moore et al., *Moore's Federal Practice* § 642.03[1], at 642-14 (3d ed. 2010) (emphasis added). In this Court, petitioner intimates for the first time that the proceeding below amounted to criminal rather than civil contempt. Br. 38-42; Pet. 29 n.20. That issue was not preserved below, is outside the question presented, and is meritless.

A state's classification of its proceedings as civil or criminal provides "strong guidance" as to its nature, which petitioner can rebut only by offering "the clearest proof" that the state's description is incorrect. *Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 631 (1988) (internal quotation marks omitted). The "critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Id.* Criminal contempt is intended to punish; civil contempt is "intended to be remedial by coercing the defendant to do what he had refused to do." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911). Criminal contempts vindicate courts' and governments' interests, while civil contempts are primarily for the benefit of those "'individuals whose private rights and remedies they were instituted to protect or enforce.'" *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 328 (1904) (quoting *In re Nevitt*, 117 F. 448, 458 (8th Cir. 1902)). When the "relief provided is a

sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order,' and is punitive if 'the sentence is limited to imprisonment for a definite period.'" *Hicks*, 485 U.S. at 632 (quoting *Gompers*, 221 U.S. at 442).

A "paradigmatic coercive, civil contempt sanction" is jailing a defendant for refusing to pay alimony "until he complies." *Bagwell*, 512 U.S. at 828 (citing *Gompers*, 221 U.S. at 442);[9] *see also Chadwick* v. *Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) (Alito, J.) (holding that confined contemnor in alimony case had no right to criminal procedures). Refusal to pay alimony is indistinguishable from petitioner's refusal to pay child support.

This Court has focused on the presence of a purge clause as dispositive. Where a contemnor can "purge the contempt and obtain his relief by committing an affirmative act, [he] thus 'carries the keys of his prison in his own pocket.'" *Bagwell*, 512 U.S. at 828 (quoting *Gompers*, 221 U.S. at 442 (internal quotation marks omitted)). Therefore, "[i]f the relief imposed . . . is in fact a determinate sentence with a purge clause, then it is civil in nature" and does not require criminal procedures. *Hicks*, 485 U.S. at 640 (child-support case). A contempt order accompanied by a purge

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[9] Distinguishing the two forms of contempt may be more difficult when fines and injunctions regulating complex patterns of conduct are at issue. *See Bagwell*, 512 U.S. at 827, 838.

clause has long been recognized as "a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966) (quoting *Green* v. *United States*, 356 U.S. 165, 197 (1958) (Black, J., dissenting)).

That is exactly the case here. The family court, orally and in writing, informed petitioner that he could "purge himself of the contempt and avoid the sentence" by paying the child support he owed Mrs. Rogers. Pet. App. 18a; *accord id.* at 7a. The action petitioner had to perform was simple and well-defined. Petitioner was well aware of the purge clause: on four previous occasions, he had satisfied his obligations, purged his contempts, and avoided or terminated confinement. Because the child-support contempt order here contained a purge clause and was "'instituted to preserve and enforce the rights of private parties to suits,'" it was undeniably civil. *Bessette*, 194 U.S. at 328 (quoting *Nevitt*, 117 F. at 458).

2. Petitioner nevertheless posits the novel theory that if a judge errs in imposing civil contempt, the order "sounds in criminal contempt" and becomes unconstitutional because it lacked criminal procedures. Br. 40 (citing *Maggio* v. *Zeitz*, 333 U.S. 56, 72 (1948)); *see id.* at 41 ("Providing counsel . . . is necessary . . . to ensure that the proceeding is in fact not punitive, but appropriately *civil* in the first instance."). To solve this imagined problem, in which allegedly erroneous findings of fact would retroactively convert

civil-contempt cases into criminal ones, petitioner proposes appointing counsel in every case to "ensure that the proceeding remains civil." Br. 39.

This argument mischaracterizes this Court's precedents. A judge may impose civil-contempt sanctions unless and until it becomes "clearly established" that compliance is impossible. *Hicks*, 485 U.S. at 638 n.9. Even if an appeals court reverses a trial court's factual finding that a civil contemnor was able to comply, the civil-contempt case does not become a criminal one. The case remains civil, but the judgment must be reversed, just as when an appellate court reverses any other essential factual finding in a civil case.

To be sure, if the trial court declares that it is "punish[ing a contemnor] for refus[ing] to perform" "an impossibility," then the confinement is not conditional and the civil contemnor must be released. *Maggio*, 333 U.S. at 59 (internal quotation marks omitted). Similarly, if a contemnor is held in contempt for failure to testify before a grand jury and the contempt confinement continues even after the underlying grand jury proceeding has ended, "the rationale for the civil contempt vanishes, and the contemnor has to be released." *Shillitani*, 384 U.S. at 372.

Petitioner's case, however, is nothing like *Maggio* or *Shillitani*. Unlike the judge who declared that Maggio could not comply, here Judge Cain specifically found petitioner in willful contempt, Pet. App. 18a, making an "implied finding" that petitioner had not

proven that he was unable to pay. *Rylander*, 460 U.S. at 760. And while it was utterly impossible for Shillitani to comply with the court order once the grand jury had been dismissed, there was no impossibility here. Though petitioner argues that he "was unable to pay" (Br. 2), neither he nor his counsel on appeal presented any evidence supporting that claim. Nor did they press that claim on appeal, though South Carolina law allowed them to do so. *See supra* p. 15. When a contemnor claims that he cannot comply but fails to establish or even press that claim, the case remains civil. *See, e.g.*, *Rylander*, 460 U.S. at 757. Every contemnor could allege inability to comply; accepting such bare assertions would eradicate the long-standing distinction between criminal and civil contempt.

Moreover, even if compliance is or becomes impossible, that does not convert a civil contempt into a criminal one. Though the sentence in *Shillitani* later became unconditional, this Court held that "the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings." 384 U.S. at 368. Thus, the criminal procedures of indictment and jury trial were not required. *Id.* at 365; *see also Maggio*, 333 U.S. at 68 ("We thus have before us now a civil contempt," not a criminal one).

In short, even if a judge imposes a civil contempt in error, it is simply an erroneous civil contempt. Courts judge the nature of contempts *ex ante*, based on whether the confinement order contains a purge clause with which the court considers it possible to

comply and obtain release, and whether the remedy runs to the injured party. *Hicks*, 485 U.S. at 631-32. One cannot invalidate a contempt finding *ex post* simply by alleging that a possible fact-finding error retroactively converted the entire proceeding from civil to criminal, requiring criminal procedures in retrospect.

C. Extending the Sixth Amendment Right From Criminal to Civil Cases Would Lead Down a Slippery Slope

Petitioner's position, if adopted, would flood courts with litigation seeking to extend other criminal protections to civil cases. Hundreds of thousands of cases concerning immigration and customs detention, post-conviction collateral attacks, or extradition may involve loss of liberty, but none has been treated as a criminal proceeding. U.S. Br. 31-32 (noting that petitioner's logic would require appointing counsel in immigration proceedings, "conflict[ing] with Congress's express" rejection of any such right in 8 U.S.C. § 1362 (2006)); *Cheuning* v. *Rogerson*, 29 F.3d 418, 421 (8th Cir. 1994) ("It is well settled that extradition proceedings are not considered criminal proceedings that carry the sixth amendment guarantee of assistance of counsel."). Parties to these civil proceedings are not currently afforded criminal-procedure protections such as the rights to appointed counsel, a jury, a speedy and public trial, and proof beyond a reasonable doubt. Courts would face endless line-drawing decisions about whether to extend other criminal procedures to

civil-contempt and other civil proceedings. Litigants would be free to mount collateral attacks, alleging ineffective assistance of counsel (whether appointed or retained) in a variety of civil cases.

Petitioner cannot avoid this slippery slope by suggesting that "the unique role that appointed counsel can play in preserving the civil character of a contempt proceeding also distinguishes the right to appointment of counsel from other [criminal-procedure] safeguards." Br. 41 n.23. Other criminal-procedure safeguards could play equally important roles. Jury trials could help to improve accuracy and reduce anti-defendant errors. Shifting the burden of proof to the plaintiff, or even requiring her to prove the alleged contemnor's willfulness beyond a reasonable doubt, would be a much stronger safeguard against erroneous contempt findings than appointing counsel. *See In re Winship*, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard . . . . is a prime instrument for reducing the risk of convictions resting on factual error."). Yet none of these criminal procedures is required in civil-contempt cases. *Bagwell*, 512 U.S. at 827; *Hicks*, 485 U.S. at 637-38 (recognizing that state can place burden of persuasion on civil contemnor who claims inability to pay child support).

Extending the right to appointed counsel to civil cases could throw these precedents into doubt, leaving states with little guidance. "It is of great importance to the States that they be able to understand clearly and in advance the tools that are available to

them in ensuring swift and certain compliance with valid court orders." *Hicks*, 485 U.S. at 636. Blurring the civil/criminal line "would create novel problems where now there are rarely any – novel problems that could infect many different areas of the law." *Id.* at 637.

This Court has been down this road before and had to turn back. In *United States* v. *Halper*, this Court disregarded the civil/criminal distinction and upheld a civil double jeopardy claim. 490 U.S. 435, 447 (1989). *Halper* led to a "wide variety of novel double jeopardy claims," including claims that revocation of a pilot's license, SEC debarment, and eviction from public housing violated the Double Jeopardy Clause. *Hudson* v. *United States*, 522 U.S. 93, 98 & n.4 (1997). *Halper*'s effort to denominate some civil penalties as punitive quickly proved "ill considered" and "unworkable," so this Court in *Hudson* repudiated *Halper*'s approach only eight years later. *Id.* at 96, 101-02. That experience cautions against repeating *Halper*'s error here.

III. Due Process Does Not Create a *Per Se* Right to Appointed Counsel in All Cases That May Result in Confinement, or Even in All Child-Support Civil-Contempt Proceedings

Due process "expresses the requirement of 'fundamental fairness.'" *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981). A defendant may assert either

a *per se* due process right to appointed counsel given the nature of the proceedings, or a case-specific claim that the denial of counsel made his particular proceeding fundamentally unfair. *Gagnon*, 411 U.S. at 788-90. Petitioner raises only a *per se* claim. But he fails to prove that without appointed counsel, child-support civil-contempt proceedings are fundamentally unfair in "the generality of cases, not the rare exceptions." *Mathews*, 424 U.S. at 344.

A. There Is No Automatic or Presumptive Right to Counsel in All Civil Cases Involving Deprivation of Liberty

1. While "criminal prosecutions" require appointment of counsel by virtue of the Sixth Amendment's categorical guarantee, other proceedings do not. *See Gagnon* v. *Scarpelli*, 411 U.S. 778, 788-89 (1973). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Lujan* v. *G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (quoting *Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961)).

Thus, this Court has declined to recognize a categorical right to counsel even in cases potentially involving loss of liberty. *See, e.g.*, *Gagnon*, 411 U.S. at 782-90; *Parham* v. *J.R.*, 442 U.S. 584, 606-07, 610-11

n.18 (1979) (commitment of minor to mental hospital does not require counsel); *Middendorf*, 425 U.S. at 48.[11] For example, in *Gagnon* this Court found "no justification for a new inflexible constitutional rule with respect to the requirement of counsel" in all probation-revocation hearings, even though the "loss of liberty . . . is a serious deprivation." 411 U.S. at 790, 781. "While such a [categorical] rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel." *Id.* at 787.

2. Contrary to petitioner's claim, *Lassiter* did not establish "a 'presumption' in favor of appointment of counsel" whenever loss of liberty is possible. Petr. Br. 33 (quoting *Lassiter*, 452 U.S. at 26). In rejecting a mother's claimed right to counsel before her parental rights could be terminated, this Court found a "presumption that there is *no* right to appointed counsel in the absence of *at least* a potential deprivation of physical liberty." 452 U.S. at 31 (emphases added); *accord id.* at 26-27.

Petitioner commits a logical fallacy in relying on *Lassiter* for the inverse proposition: that whenever a

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[11] *Cf. Vitek* v. *Jones*, 445 U.S. 480, 497-500 (1980) (Powell, J., controlling concurrence) (holding that prisoner's involuntary transfer to mental hospital does not trigger a *per se* right to counsel, but allowing a psychiatrist or layman to represent him instead, "particularly" because a prisoner in this type of proceeding will often be of unsound mental "capability").

litigant faces potential deprivation of physical liberty, there is a presumption *in favor of* appointing counsel. Since *Lassiter* itself did not involve a threat of confinement, this Court had no occasion to hold – and did not hold – that when loss of liberty is at stake, there is a presumption in favor of appointing counsel. On the contrary, *Lassiter* expressly adopted *Gagnon*'s conclusion that a case-by-case approach to appointing counsel suffices to protect constitutional rights, even a mother's right to raise her own child. *Id.* at 31-32 (quoting *Gagnon*, 411 U.S. at 788).

3. This Court has never recognized a categorical right to counsel outside a traditional criminal prosecution, with the unique exception of juvenile-delinquency proceedings, which are criminal in all but name. *In re Gault*, 387 U.S. 1, 36, 41 (1967); *see Gagnon*, 411 U.S. at 789 n.12 (reading *Gault* as recognizing right to appointed counsel because juvenile-delinquency proceeding, "while denominated civil, was functionally akin to a criminal trial").

Gault recognized such a right because it involved (a) a prosecution brought by an experienced criminal-justice professional against an unrepresented minor;[12] (b) an *unconditional* sentence of six years' confinement; and (c) "only slightly less stigma" than a

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[12] Minors lack the capacity to sue or defend suits without a representative, next friend, or guardian ad litem. Fed. R. Civ. P. 17(c). The law thus recognizes that minors categorically require representation while adults do not.

criminal conviction, including a record of delinquency that would be furnished to employers and law-enforcement agencies. 387 U.S. at 7-9, 23-25, 36. All three factors combined made the juvenile-delinquency proceedings "'comparable in seriousness to a felony prosecution'" and so in "need [of] criminal due process safeguards," including appointed defense counsel. *Winship*, 397 U.S. at 366, 368 (quoting *Gault*, 387 U.S. at 36). None of those factors is present here.

B. Historic Civil-Contempt Procedures Enjoy a Strong Presumption of Constitutionality and Do Not Require a Categorical Right to Appointed Counsel to Make Them Fundamentally Fair

In *Medina* v. *California*, this Court held that where state criminal procedures are "grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." 505 U.S. 437, 446 (1992). *Medina* declined to apply the *Mathews* due process test to such procedures. Instead, it applied a strong presumption of constitutionality that could be overcome only by showing that the challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Id.* at 445 (internal quotation marks omitted).

The same deferential approach should apply to civil procedures in areas of predominantly state

concern with deep roots in judicial tradition. Historically, states have played a preeminent role in family-law matters, as recognized by the domestic-relations exception to federal jurisdiction. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 694-95, 703 (1992); *McIntyre* v. *McIntyre*, 771 F.2d 1316, 1317-18 (9th Cir. 1986) (Kennedy, J.). Civil contempt itself is a long-standing and necessary power to protect private litigants and compel performance of legal obligations. It dates back four centuries, to the Court of Chancery in seventeenth-century England. David Eady & A.T.H. Smith, *Arlidge, Eady & Smith on Contempt* 13, at 1-41 (2d ed. 1999). To this day, "courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani*, 384 U.S. at 370. Without this power, "courts could not administer public justice or enforce the rights of private litigants." *Gompers*, 221 U.S. at 450.

Petitioner thus errs in asking this Court to apply *Mathews*'s three-pronged balancing test. Br. 43-50. This Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenbery* v. *United States*, 534 U.S. 161, 168 (2002). *Mathews* arose "in the context of modern administrative procedures, [where] there was no historical practice to consider." *Medina*, 505 U.S. at 453-54 (O'Connor, J., concurring).

Nothing about routine *pro se* civil-contempt proceedings "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Medina*, 505 U.S. at

446. Petitioner points to no historic tradition of appointing counsel in civil-contempt cases, and we can find none. The factual issues are simple; the rules of procedure and evidence are relaxed; and neither party is represented by counsel. *See infra* pp. 50-54. Indeed, providing counsel across the board would make proceedings less fair. Indigent mothers seeking child support cannot afford to hire lawyers. Introducing lawyers on one side but not the other would tilt the playing field; add delay, expense, and complexity (*see* U.S. Br. 28); and likely result in fewer, slower recoveries for needy mothers and their children.

C. Even If It Applied, the *Mathews* Balancing Test Would Not Support a Categorical Right to Counsel in All Child-Support Civil-Contempt Proceedings

Even if it applied in this context, *Mathews*'s balancing test would not require appointing counsel in all child-support civil-contempt proceedings brought by *pro se* plaintiffs. The question is not whether lawyers would be helpful, but whether not appointing lawyers across the board would violate "fundamental fairness." *Gagnon*, 411 U.S. at 790; *see also Lassiter*, 452 U.S. at 24-25. We have found no case in which this Court has recognized a categorical right to counsel

under *Mathews*. On the contrary, this Court has repeatedly rejected such claims.[13]

Mathews's balancing test assesses categories of cases sharing the same factual and procedural context. Thus, this Court framed the issue in *Mathews* in terms of "termination of Social Security disability benefit payments," not government benefits generally. 424 U.S. at 323; *see also id.* at 340-41 (distinguishing disability from welfare benefits in applying balancing test). Here, the relevant category is not all civil-contempt proceedings, but those brought by *pro se* parents to enforce child support. *Cf.* Petr. Br. 46-49 (focusing on specifics of child-support civil contempts); U.S. Br. 27-31 (same).

Child-support civil-contempt proceedings are straightforward, so lawyers are not essential to prevent errors. While nonsupporting fathers have significant liberty interests, they are adequately safeguarded by procedures simple enough to navigate without lawyers. On the other hand, the interests of custodial mothers, their children, and the government in prompt, effective child-support enforcement would be disserved by mandating lawyers across the board.

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[13] The Court has applied due process balancing to reject claimed rights to appointed or even retained counsel. *See, e.g.*, *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307-08, 320-26 (1985); *Lassiter*, 452 U.S. at 31-32; *Parham*, 442 U.S. at 599-600, 606-07, 610-11 n.18; *see also Goss* v. *Lopez*, 419 U.S. 565, 583-84 (1975); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-70 (1974); *Gagnon*, 411 U.S. at 790.

1. Fathers' Interests Are Adequately Protected by Straightforward Family Court Procedures

a. While civil contemnors have significant liberty interests in avoiding confinement, their interests are substantially weaker than those of criminal defendants. Civil contemnors face no criminal records or collateral consequences, often (as here) have sanctions capped at one year, and often (as here) can free themselves by purging their contempts immediately or through work release. Petitioner, for example, could have earned wages, discharged his arrearages, and freed himself after serving less than half of his maximum term of confinement.[14]

b. Because typical child-support civil-contempt proceedings are simple both factually and legally, "the risk of an erroneous deprivation" is already low, so "additional or substitute procedural safeguards" would have little value. *Mathews*, 442 U.S. at 335.

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[14] There is no record evidence that petitioner asked to participate in work release or that he would have been prevented from doing so. *Supra* p. 14 n.3. He had automotive, painting, and construction work experience. *Supra* p. 10. Around Easley, South Carolina, the lowest paying of these three is construction work, at a median wage of $13.20 per hour. *May 2009 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates*, Bureau of Labor Statistics, *available at* http://www.bls.gov/oes/current/oes_24860.htm#49-0000. At that rate, he would have earned $528 per forty-hour work week. After deducting 25% for taxes and expenses, and applying 70% of the remainder toward child support, petitioner could have paid $277.20 per week and discharged his arrearages by June 2008.

Gagnon rejected a categorical right to counsel in probation-revocation hearings. 411 U.S. at 790. Probation violations are usually already established or admitted; mitigating evidence is often "so simple as not to require either investigation or exposition by counsel"; and there are no state prosecutors, jury trials, or formal rules of evidence and procedure. *Id.* at 787, 789. Thus, probation-revocation hearings do not require counsel across the board as criminal trials do, *id.* at 790, even though years of confinement are at stake.[18]

The same considerations apply here. Most child-support contempt cases turn on only two issues: (1) Did the defendant pay? (2) Could he have paid? The first of these is a simple bookkeeping matter that will rarely be in dispute. *Cf.* JA 103a-132a (list of payments made and due); *Gagnon*, 411 U.S. at 787. Likewise, the obligor's inability to pay is a straightforward factual matter. "Just as '[n]o legal expertise is needed to [establish inability to afford counsel] under the Criminal Justice Act,' no legal expertise is generally required to establish inability to pay child-support arrears." U.S. Br. 28 (quoting *United States* v.

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[18] In *Gagnon*, the premise of the Court's opinion was that the grant of probation is not "an act of grace" that could freely be withdrawn. 411 U.S. at 782 n.4 (internal quotation marks omitted). In other words, probationers have a legal right to remain free, though that right can be withdrawn (as it can for petitioner) if he fails to comply with certain conditions. *See* Pet. App. 23a-24a.

Bauer, 956 F.2d 693, 695 (7th Cir. 1992) (internal citation omitted)).[16]

Inability to pay is usually an obligor's only realistic defense. He can assert it himself by explaining his lack of funds. *See Maggio*, 333 U.S. at 75-76 ("[I]f he offers no evidence as to his inability to comply, or stands mute, he does not meet the issue."). Someone who lacked money would naturally explain that he cannot pay; he would not need a lawyer to tell him that or make that claim for him. Moreover, inability to pay is a straightforward matter of assets, employment, and other sources of income. W-2 forms, paycheck stubs, tax returns, and notes from doctors or employers are simple documents that obligors can bring and introduce themselves. *See* JA 50a (rule to show cause advising petitioner to "BRING PROOF OF EMPLOYMENT").

"This is a more sharply focused and easily documented decision" than a pure judgment of witness credibility. *Mathews*, 424 U.S. at 343. The rules of

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[16] "[T]he legal or factual basis of the [underlying child-support] order" is "not open to reconsideration" or collateral attack in a civil-contempt proceeding. *Maggio*, 333 U.S. at 68-69; *see* 42 U.S.C. § 666(a)(9)(C) (2006) (forbidding retroactive modification of child-support orders except in limited circumstances). Obligors can modify child-support orders prospectively, however, through separate proceedings. Indeed, petitioner's child-support order advised him of how to do so, and in South Carolina there is free legal help for *pro se* obligors who wish to modify their child-support obligations. *Supra* pp. 9, 5-6 & n.1; Pet. App. 23a.

evidence and procedure are relaxed and there are no jury trials. *See, e.g.*, S.C. Fam. Ct. R. 2(a), 7 (dispensing with authentication of common documents such as W-2 forms, paycheck stubs, and doctors' or employers' notes), 25 (restricting formal depositions and discovery). Third-party witnesses, motions, and evidentiary rulings are extremely rare, even when lawyers are involved. *See Rodriguez*, 102 P.3d at 51 ("[R]arely would defenses amount to more than marshaling the financial facts of whether he or she has made the required payments and conducting simple bookkeeping."); *State ex rel. Dep't of Hum. Servs.* v. *Rael*, 642 P.2d 1099, 1103 (N.M. 1982) ("The defendant is usually capable of marshalling the financial facts . . . [and] [t]he presence of a court-appointed attorney would do little to enhance the accuracy of the decisionmaking in most cases . . . .").

Petitioner also claims lawyers are essential to make legal arguments by, for example, construing the inability-to-pay defense. Br. 36-37 & n.21. But inability to pay is a simple, intuitive concept. Petitioner's appellate lawyers raised no such legal challenges, confirming that they are not contestable in the typical case. Only rarely do these cases involve technical issues such as res judicata or statutes of limitations. *Rael*, 642 P.2d at 1103-04.

The need for counsel here is far weaker than in *Lassiter*, where this Court nevertheless rejected a categorical right to counsel in proceedings to terminate parental rights. *Lassiter* recognized the extraordinary strength of a mother's liberty interest – the

"extremely important" and "unique kind of deprivation" that attends loss of parental rights. 452 U.S. at 31, 27. Moreover, *Lassiter* involved formal, adversarial proceedings against opposing state counsel, which required *pro se* litigants to examine and cross-examine witnesses and sometimes involved "[e]xpert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute." *Id.* at 21-23, 30. *Lassiter*'s rejection of a categorical right to counsel *a fortiori* requires rejecting it here.

c. Inability to pay is essentially the same as inability to afford counsel. Neither determination itself requires counsel. Rather, inability to afford counsel is ordinarily a simple factual *prerequisite* to appointing counsel. A criminal defendant has no right to an appointed lawyer until he first proves that he cannot afford one. *See, e.g.*, 18 U.S.C. § 3006A(b) (2006); *United States* v. *Harris*, 707 F.2d 653, 660 (2d Cir. 1983). A defendant is not entitled to receive an appointed lawyer to help him prove that he is entitled to an appointed lawyer. *Bauer*, 956 F.2d at 695 (rejecting right to appointed counsel to help show qualification for appointed counsel). That would be circular.

d. Lawyers are unlikely to make a substantial difference in these simple proceedings. A recent randomized, controlled Harvard study of simple, nonjury litigation found no significant difference in success rates between litigants who were offered legal representation and those who were not. D. James Greiner

& Cassandra Wolos Pattanayak, *What Difference Representation?* 5, 8, 25-29 (Jan. 12, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1708664. The only important difference was that introducing lawyers delayed cases' resolution. *Id.* at 8-9, 29-33, 53-54, 68-70 (also concluding that most other studies are fatally flawed by nonrandom lawyer assignment, and noting that in one reliable earlier study, lawyer effects disappeared in informal proceedings); *see also Indiana* v. *Edwards*, 544 U.S. 164, 178 (2008) (noting that *pro se* felony defendants fare at least as well as represented ones).

During and for the purposes of this litigation, amicus Patterson conducted an empirical study purporting to find that *pro se* South Carolina family court defendants are disadvantaged and much more likely to be held in contempt. Patterson et al. Br. 6, 10-22. This Court should disregard that extra-record evidence, particularly because our own review of family court proceedings and records in Oconee and Anderson Counties, South Carolina, confirmed that the proceedings were highly informal, practical events designed to determine the simple facts of whether the defendant could pay, when, and how much. They involved no third-party witnesses or legal or evidentiary issues of the sort that either party would need a lawyer to address. And there was no reason to believe that when the defendant had a lawyer, the lawyer's presence

made a difference.[17] Thus, this Court should disregard amicus's mistaken and controverted conclusions.

e. Even if there were any technical legal issues for lawyers to address, requiring states to appoint counsel in every case would be unwarranted. In practice, given fiscal constraints, appointed lawyers would do little more than reiterate defendants' own

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[17] Details of our method and the names of the 201 cases studied are at App. 56a-68a. Our other findings likewise contradict amicus's assertions: First, even when DSS appeared, it was only nominally a party and (with a single one-sentence exception) merely responded to the judge's administrative questions about the mechanics of child-support payments. Judges handled all questioning, directing all case-specific factual questions solely to the parties. Second, at every hearing observed, the judges asked "wholly retrospective factual question[s]." *Gagnon*, 411 U.S. at 784. Third, the judges never enforced the rules of evidence, admitting any evidence an obligor wanted to introduce to excuse nonpayment. *Pro se* litigants frequently introduced documents such as employers' or doctors' notes and so avoided confinement. Fourth, judges calibrated purge amounts and dates to what obligors said they could pay and when. Thus, while many were held in contempt, far fewer were actually confined.

Finally, in the few cases where litigants were represented by attorneys, there was no evidence that the attorneys made motions, argued rules of evidence, construed statutes, made other technical arguments, or questioned witnesses. They merely narrated why their clients could not pay. Their most lawyerly acts were requests for continuances. Of the fourteen cases with some reference to an attorney, in at least nine the attorney appeared to be a workers' compensation or disability attorney who did nothing more than inform the family court of the obligor's pending disability claim. Because the presence of counsel was strongly correlated with claimed disabilities, one cannot infer that the lawyers, rather than the disabilities, altered outcomes.

narrative accounts of their employment and illnesses. Petitioner's own amicus reports that when lawyers are appointed in child-support cases, they are often too overburdened to provide much help. "In many of the courtrooms we watched, these attorneys would call out their client's name as the court room filled with cases, meeting the client for the first time just prior to the hearing." Rebecca May & Marguerite Roulet, Ctr. for Fam. Pol'y & Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment* 45 (2005). "For many noncustodial parents . . . the costs [of paying lawyers] add to an existing burden without a tangible gain. Lawyers with a high turnover in cases who have little time to get to know their clients stand little chance of building a case that could persuade a judge to be lenient . . . ." *Id.*

f. Finally, the possibility of a few "atypical cases with 'complex factual and legal issues'" does not justify appointing counsel across the board. U.S. Br. 29 (quoting Petr. Br. 46). "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews*, 424 U.S. at 344. Courts have discretion to appoint counsel in exceptional cases or employ other procedures as safeguards. *Gagnon*, 411 U.S. at 790-91; U.S. Br. 24-27 & n.9; *infra* pp. 62-63.

In short, even if appointing counsel might bring marginal benefits, those gains would come at substantial costs, including complexity, rigidity, and delay. *Gagnon*, 411 U.S. at 787-89; *Gerstein*, 420 U.S.

at 122 n.23. "In most cases, . . . [these gains] would be too slight to justify holding" that the Constitution requires appointing counsel in every single case. *Gerstein*, 420 U.S. at 122; *accord Gagnon*, 411 U.S. at 787-90.

2. Mothers', Children's, and the Government's Interests in Fair, Effective Child-Support Enforcement Would Be Disserved by Appointing Counsel for All Nonpaying Fathers

a. Custodial parents have compelling interests in providing for their children. *See, e.g.*, *Parham*, 442 U.S. at 600-04 (weighing parents' interest in their children's "welfare and health"). A mother has a "commanding" interest in the custody and care of her child. *Lassiter*, 452 U.S. at 27. This Court has treated that interest as commensurate with probationers' liberty interests in avoiding years of confinement. *See M.L.B.* v. *S.L.J.*, 519 U.S. 102, 117 (1996).

Complicating and delaying *pro se* mothers' efforts to obtain child support jeopardizes their parental interests. Many mothers are poor and need prompt, reliable payments so they can care for and retain custody of their children. *See supra* p. 4; U.S. Census Bureau, *supra*, at 4-5. Indeed, Mrs. Rogers had to relinquish custody of B.L.P. at least in part because she could not provide for her without assistance. Contrary to petitioner's assertion, states find that civil-contempt proceedings are a highly effective

backstop. *See supra* pp. 7-8. The mere threat of civil contempt "is effective when nothing else will work and the [noncustodial parent] is working for cash or in the underground economy." OCSE Survey, *supra*. A nonpayor who is held in civil contempt has a strong incentive to purge the contempt, either by finding the money he owes or by engaging in work release. The prospect of confinement is so effective that most fathers purge their contempts and so avoid being confined. *See id.*

Requiring appointed counsel in every proceeding would delay collecting child-support payments. *See Gagnon*, 411 U.S. at 788. "'Within the limits of professional propriety, causing delay and sowing confusion not only are [the lawyer's] right but may be his duty.'" *Walters*, 473 U.S. at 325 (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1287-90 (1975)). Children need daily care, and any delay in collecting child support jeopardizes their well-being.

Moreover, *pro se* custodial parents have a strong interest in enforcing their rights on a level playing field. Mothers have no right to appointed counsel and little access to lawyers. They need child support precisely because they cannot afford necessities, let alone lawyers. Adding lawyers would make proceedings more formal, more adversarial, more complex, and even slower. *Gagnon*, 411 U.S. at 787-88. Opposing counsel could well overwhelm an uneducated *pro se* mother or wear her down with continuances. If nonpaying parents are given a categorical right to

appointed counsel, the "contest of interests may become unwholesomely unequal." *Lassiter*, 452 U.S. at 28. Introducing counsel on only one side would unbalance proceedings, making them less fair, not more. *See* U.S. Br. 28.

b. State and federal governments share a strong interest in ensuring that custodial parents collect the child support they are due so that they can provide for their children. *See* U.S. Br. 1-2. Courts also have a strong interest in enforcing their judgments and preventing contemnors from flouting their obligations. *Gompers*, 221 U.S. at 450.

In addition, "the financial cost to the State [of recognizing a new right to counsel] will not be insubstantial." *Gagnon*, 411 U.S. at 788. As petitioner recognizes, courts would have to appoint counsel in every proceeding, regardless of the facts involved, the complexity of the case, or indeed whether the defendant sought counsel at all. Br. 19, 50 n.24. The funding for a new categorical right to counsel might well come from resources currently devoted to child-support enforcement or other important government programs. "[A]dditional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries." *Walters*, 473 U.S. at 326, *accord id.* at 321 n.9 ("'[A]t some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and . . . the expense of protecting those likely to be found undeserving will probably come out of the

pockets of the deserving.'" (quoting Friendly, *supra*, at 1276)).

The additional expense will deter some states from using civil contempt to enforce child support. In fact, it already has. In the wake of a 2006 state-court ruling mandating appointed counsel in civil-contempt cases, New Jersey has been unable to fund such counsel. *Pasqua* v. *Council*, 892 A.2d 663, 674 (N.J. 2006); OCSE Survey, *supra*. Thus, New Jersey child-support officials must release nonsupporting parents who appear to qualify for appointed counsel, instead of enforcing child support through civil contempt. OCSE Survey, *supra*. When states use civil contempt less often, or more slowly, they must provide costly welfare assistance to many children as they await support from nonpaying parents.

State governments already struggle to satisfy criminal defendants' Sixth Amendment rights to counsel. South Carolina's budget for public defenders is stretched beyond capacity. *See* Patrick Donohue, *Solicitor Goes to Local Governments, Hat in Hand, Seeking Money to Offset Cuts*, Beaufort Gazette (Beaufort, S.C.), Mar. 24, 2009, at 1A, 5A. The same is true nationwide, as petitioner's own amici acknowledge. Am. Bar. Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* iv-v (2004); Nat'l Right to Counsel Comm., The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 7 (2009).

To conserve scarce resources, Congress has specifically declined to fund appointed counsel in child-support civil-contempt cases. U.S. Br. 30-31. Likewise, South Carolina has reserved appointed counsel for criminal and unusually complex civil cases. *See* S.C. App. Ct. R. 608(g)(1) (announcing policy of limiting appointments to prevent "an undue burden on the lawyers of this State"); *Ex parte Foster*, 565 S.E.2d 290, 293 (S.C. 2002). This Court should defer to these federal and state legislative judgments about how best to allocate limited funds. *See Walters*, 473 U.S. at 319.

Imposing a civil *Gideon* requirement on public defenders and other appointed lawyers, on top of the existing strain of criminal cases, would make the overburdening and underfunding of criminal defense counsel worse. Governments are entitled to engage in triage, reserving free lawyers for those cases expressly included within the Sixth Amendment's criminal scope.

IV. While Due Process Provides for Appointing Counsel in Exceptional Cases Where Essential for a Meaningful Opportunity to Be Heard, Neither a Case-Specific Balancing-Test Claim Nor the Acting Solicitor General's Novel Suggestion of Additional Procedures Is Properly Before This Court

While there is "no justification for a new inflexible constitutional rule with respect to the requirement of

counsel" in child-support civil-contempt cases generally, "the peculiarities of particular cases" may call for narrower remedies. *Gagnon*, 411 U.S. at 790, 789. Courts could appoint counsel case by case or experiment with other procedures. These alternative claims, however, were not preserved below, are beyond the question presented, and are not properly presented here.

One possibility is that counsel could be appointed in unusually complex cases "on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility" for the system. *Gagnon*, 411 U.S. at 790. Indeed, South Carolina law authorizes court-appointed counsel in just such complex cases. *See* S.C. App. Ct. R. 608(g); *Foster*, 565 S.E.2d at 292-93 (remanding for determination whether action was "so complex" that failure to appoint lawyer would "unfairly hamper [respondent's] ability to defend his case").

A future litigant could also raise a due process challenge to the specific procedures used at his contempt proceeding, such as the particular forms used or the follow-up questions a particular judge asked. U.S. Br. 24-25. The United States raises this suggestion for the first time in this case as an amicus at the merits stage.

Neither of these case-specific claims, however, is before this Court. Petitioner waived both case-specific claims by failing to raise or develop them below. His

counsel's state-court appellate brief argued only for an "absolute" right to counsel in all "cases where the proceedings could result in a deprivation of physical liberty." Pet. App. 12a. It relied on *Lassiter*'s limitation of *Argersinger* v. *Hamlin*'s categorical rule. *Id.* at 11a-12a (citing 452 U.S. at 26 and 407 U.S. 25, 37, 40 (1972)). It never cited *Gagnon* or *Gagnon*'s case-specific balancing approach. Its argument referred to no facts, equities, or complexities specific to petitioner's case. *Id.* at 11a-15a. Nor did counsel develop the relevant facts or seek a hearing to develop them, which would be crucial to this Court's evaluation of either case-specific claim. Likewise, amici below framed the claim entirely as a *per se* "Sixth Amendment right to counsel." ACLU et al. Br. 1 (S.C. S. Ct.). Thus, the South Carolina Supreme Court was not presented with and did not pass upon either variety of case-specific due process claim.

By denying the state courts an opportunity to address any case-specific due process claim, petitioner has waived all such claims. "[I]t is 'the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.'" *Kentucky* v. *Stincer*, 482 U.S. 730, 747 n.22 (1987) (quoting *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)).

Moreover, such case-specific claims are well beyond the question presented. *See* S. Ct. R. 14.1(a). Petitioner's certiorari petition framed the question

presented in categorical terms, limited to the "constitutional right to appointed counsel." Pet. i. His argument did not invoke his particular need for counsel, let alone other procedures. *Id.* at 11-32. And petitioner's merits brief explicitly asks for "a *categorical* right to counsel, not merely a case-by-case right that depends on the merit or complexity of the case or the defendant's capacity to speak effectively for himself." Br. 50 n.24. There is no jurisdiction to entertain other due process claims.

CONCLUSION

For the foregoing reasons, this Court should dismiss the writ for lack of jurisdiction, or in the alternative affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted.

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APPENDICES

IV-D

SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES
CHILD SUPPORT ENFORCEMENT DIVISION

ADMINISTRATIVE PROCESS

NOTICE OF FINANCIAL RESPONSIBILITY AND PATERNITY DETERMINATION

COUNTY OF ANDERSON
DOCKET NO. _____
CSED CASE NUMBER 0482527

TO:	EMPLOYER:
MICHAEL D. TURNER	Earl F. Wilbanks
[Home Address Omitted]	[Work Address Omitted]
Townville, SC 29689	Anderson, SC 29621

The Child Support Enforcement Division (Division), pursuant to S.C. Code Ann. Section 20-7-9505 et seq., notifies you that:

1. You are the natural father of and have a duty to support and provide for the medical needs of the following child(ren)

B.L.P. [Date Of Birth Omitted]

born to Rebecca L. Price and in the custody of Rebecca L. Price.

2. You are required to appear on May 25, 1999, at 11:30 AM for a negotiation conference to determine the amount of your duty of support. The negotiation

conference will be held at: Anderson County Family Court, 100 South Main Street, Anderson, SC.

3. You may assert the following objections in the negotiation conference:

A. You are not the parent of the dependent child(ren);

B. The dependent child(ren) was/were adopted by a person other than you;

C. The dependent child(ren) is/are emancipated; or

D. There is an existing court or administrative order for child support.

4. You may file a written denial of paternity with the Division within thirty (30) days after service of this Notice of Financial Responsibility and Paternity Determination. If you fail to timely deny this allegation of paternity, the question of paternity may be resolved against you without further notice.

5. If you timely deny the allegation of paternity:

A. You are subject to compulsory genetic testing and the expenses incurred for such tests may be assessed against you;

B. A genetic test may result in a presumption of paternity;

C. Upon receipt: of the genetic test results, if you continue to deny paternity, you may request that the Division refer the matter to family court for a determination of

> paternity pursuant to S.C.Code Ann. Section 20-7-9540. An order for child support resulting from a subsequent finding of paternity is effective from the date you were served with this Notice of Financial Responsibility and Paternity Determination.

6. If such objections are not resolved, at the negotiation conference, the Division will schedule a court hearing. A Notice of Hearing indicating the date, time and place will be provided to you.

7. The Division will establish all child support orders in accordance with the child support guidelines in S.C.Code Ann.Regs. 114-4710 through 114-4750, based on the parties' income. The Division may issue an administrative subpoena to obtain income information from you, or it may rely on wage statements, wage information from the Employment Security Commission, tax records and verified statements from the custodian. In the absence of such information, the Division will impute income based upon the child support guidelines.

8. The Division will establish an order for the provision of major medical health insurance, in accordance with the child support guidelines.

9. Costs of collection (service of process, genetic test costs, certified mail, and other court costs) may be collected from you.

10. The Division shall issue an order of default setting forth a determination of paternity and the

amount of your duty of support if the following occurs:

A. You fail to send the Division a timely written denial of paternity; or

B. You fail to appear for the negotiation conference scheduled above; or

C. You fail to reschedule the negotiation conference prior to the date and time stated in this notice; or

D. You fail to send the Division a written request for a court hearing before the time scheduled for the negotiation conference; or

E. You fail to appear for a rescheduled negotiation conference; or

F. You fail to take or appear for a scheduled genetic test; or

G. The, genetic test results show a 95% or greater probability that you are the father of the child(ren); and

1. You fail to appear for a subsequent negotiation conference; and

2. You fail to reschedule the subsequent negotiation conference prior to the date and time stated in the notice.

11. If an order of default establishing paternity and financial responsibility is issued, it shall be filed with the clerk of court in Anderson County.

12. When filed, the order of default has all the force, effect and remedies available for enforcement (for example, wage assignment, contempt, tax intercept or license revocation) as an order of the court.

13. No judgment is required to certify past-due child support to the Internal Revenue Service or State Department of Revenue for purposes of intercepting federal or state tax refunds.

14. You must notify the Division of any change of address or employment within ten (10) days following such change.

15. An order issued pursuant to S.C.Code Ann. Section 20-7-9505 et seq., or an existing order of the court or any other administrative order may be modified under S.C.Code Ann. Section 20-7-9505 et seq. in accordance with the Uniform Interstate Family Support Act, S.C.Code Ann. Section 20-7-960 et seq.

16. You may request a court hearing within thirty (30) days after the receipt of the Notice of Financial Responsibility and Paternity Determination. The request must be served upon the authorized designee for the Division, whose name and address is listed below. The request must be served by certified mail or in the same manner as a summons in a civil action.

17. If you have questions, you should telephone or visit the Division at the address below.

18. You have the right to consult an attorney and be represented by an attorney at the negotiation conference.

Dated: 3-19-99 /s/ M Jackson

Authorized Designee
for the Child Support
Enforcement Division

Greenville Regional Office
Post Office Box 1887
Greenville, SC, 29602-1887
(864) 241-1101

Document sent to Coroner Raymond Richards
Turned to be Coroner Rebecca Pinn

5.8.99

OCONEE COUNTY LAW SYSTEM 09/20/10
ADD/UPDATE CONFINEMENT G100

ENTER FUNCTION ....
SOC SEC..... [Social Security Number Omitted]
SEQ # ..... 64657682 TYPE ... CELL.0000
DEL.....
NAME ..... TURNER MICHAEL DALE
RACE ..... W SEX .... M
BIRTH..... [Date Of Birth Omitted]
AGE..... 27 ETH.....N HEIGHT.....5'06"
WEIGHT..... 0155 HAIR .... BRN EYES .... GRN
BORN IN ..... NC
DESC..... SCAR CORNER R/EYE //
BIRTHMARK R/BUTTOCK
ADDRESS..... [Home Address Omitted]
CITY/ST ..... [Home Address Omitted]
ALIAS..... NONE
DR LIC..... [Drivers License Omitted] SC JOB CD..
NEXT KIN .... JENNIE TURNER // WF
EMP/JOB ..... WEAVERS BRAKE SER
ADDRESS..... WESTMINSTER SC FINGER ....N
BOOKING..... C.O. LITTLETON, LESLIE J-19
PHOTO ..... Y
DATE ..... 02182004 TIME ... 1530
HOLDING .... DETENTION
ARREST..... ROWLAND, DONNIE 9304
ARREST..... OCSD
HOLD FOR.... N
RELEASE .... CPL. SHIRLEY, DALLAS J-7
AGENCY.....
REL DATE.... 02192004 TIME ... 0920

OCONEE COUNTY DETENTION
DETENTION [sic] CENTER
CONFINEMENT REPORT

AGENCY ID : DETENTION PAGE 1
S.S. # : [Social Security Number Omitted]
SEQ # : 64660223

TYPE/CELL : 0000 FINGER PRT : Y PHOTO : Y
DEF NAME : TURNER MICHAEL DALE
RACE : W SEX : M BIRTH : [Date Of Birth Omitted]
ADDRESS : [Home Address Omitted]
PHONE : (864) 000-0000
AGE : 27 ETH : N HEIGHT : 5'06"
WEIGHT : 0155 HAIR : BRN EYES : GRN
DESC : SCAR R EYE BIRTHMARK ON R BUTTOCK
ALIAS : NONE
DRIV LIC : [Drivers License Omitted]
SC PLACE OF BIRTH : NC
NEXT OF KIN : JENNI TURNER / WF
WESTMINSTER SC
EMPLOYER/OCCU. : S&W STUCCO
ARRST DATE/TIME : 10/20/2004 1000
ARREST. OFFICER : ROWLAND, DONNIE 9304
BOOKING OFFICER : CPL. SHIRLEY, DALLAS J-7

IF HOLDING FOR ANOTHER AGENCY, CIRCLE CHARGE

CHARGE - NON-SUPPORT
CHARGE : 03-DR-37-472
STATUTE :
BOND AMOUNT :
BOND TYPE : SENTENCED
BOND DATE : 10202004
DISPOSITION : CC CLERK OF COURT

	DAYS	AMOUNT
SENTENCE	: 000090	
TIME SERVED	: 000000	
GOOD TIME	: 000044	
BALANCE	: 000046	
PAID	: 000000	
RECEIPT NUMBER	: KNOEBEL	

HOLD FOR AGENCY :
RELEASE DATE : 10222004 TIME : 1130
RELEASING OFFICER : BROWN NO.
RELEASE AGENCY :

INMATES PERSONAL PROPERTY HISTORY

TOTAL CASH ON HAND

Booking Card

TURNER, MICHAEL DALE

Print Date/Time: 08/05/2010 14:30 OCONEE COUNTY DETENTION CENTER
Login ID: spruitt **ORI Number** SC037023C
[Barcode]

Booking #: 2005-00001359 **Booking Date/Time:** 09/15/2005 18:48
Jacket #: 916 **Inmate #:**
Address: [Home Address Omitted] [Image]

Phone #: [Phone Number Omitted] **DOB:** [Date Of Birth Omitted] **Race:** WHITE (W)
SSN: [Social Security Number Omitted] **Age:** 33 **Sex:** MALE (M)
Hair Color: BRO **Eyes:** BLU **Height:** 5ft 7in **Weight** 170.0

Prisoner Type: SENTENCED **Incarceration Reason:** SENTENCED
Facility: **Pod/Block:** **Cell:** **Bed:**

Contact: TURNER, JEANIE [sic] COX **Relationship:** SPOUSE **Phone #:**
Notified By: **Date/Time:**

Charge:
State: 13B 16-25-020(A)(1) DOMESTIC/CRIMINAL DOMESTIC VIOLENCE
Offense/Charge Date: 09/15/2005 18:41 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: **Bond/Bail Set Date:** **Bond/Bail Set Amt:**
Bond Posted By: **Bond Post Date:** **Bond Post Amt:**
Severest: No

Charge:
SC037013D 9059 FC BENCH WARRANT FAMILY COURT BENCH WARRANT
Offense/Charge Date: 09/24/2005 16:32 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: **Bond/Bail Set Date:** **Bond/Bail Set Amt:**
Bond Posted By: **Bond Post Date:** **Bond Post Amt:**
Severest: No

Charge:
State 13B COMMON LAW SIMPLE ASSAULT & BATTERY
Offense/Charge Date: 01/18/2006 14:00 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: **Bond/Bail Set Date:** **Bond/Bail Set Amt:**
Bond Posted By: **Bond Post Date:** **Bond Post Amt:**
Severest: No

Release Date/Time: 01/25/2006 00:01 **Released By:** BW5572 - WALLIS
Release Reason: TIME SERVED **Released to ORI:**
Release To:

I will have opportunity to contact family or counsel

Inmate Signature:

Booking Officers: # #

Reviewed By: #

Booking Card

TURNER, MICHAEL DALE

Print Date/Time: 08/05/2010 14:30 OCONEE COUNTY DETENTION CENTER
Login ID: sprutt **ORI Number** SC0370230

[Barcode]

Booking #: 2007-00004130 **Booking Date/Time:** 4/30/2008 14:56
Jacket #: 916 **Inmate #:**
Address: [Home address Omitted] [Image]

Phone #: [Phone Number Omitted] **DOB:** [Date Of Birth Omitted] **Race:** WHITE (W)
SSN: [Social Security Number Omitted] **Age:** 53 **Sex:** MALE (M)
Hair Color: BRO **Eyes:** BLU **Height:** 5ft 7in **Weight** 170.0

Prisoner Type: SENTENCED **Incarceration Reason:** SENTENCED
Facility: **Pod/Block:** **Cell:** **Bed:**

Contact: TURNER, JENNIE **Relationship:** SPOUSE **Phone #:**
Notified By: **Date/Time:**

Charge:
SC037013D 9059 FC BENCH WARRANT FAMILY COURT BENCH WARRANT
Offense/Charge Date: 12/26/2007 15:19 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: **Bond/Bail Set Date:** **Bond/Bail Set Amt:**
Bond Posted By: **Bond Post Date:** **Bond Post Amt:**
Severest: No

Release Date/Time: 12/19/2008 14:51 **Released By:** RF1879 - FOSTER
Release Reason: BOOKING ERROR **Released to ORI:**
Release To:

I will have opportunity to contact family or counsel

Inmate Signature:

Booking Officer(s): # #

Reviewed By: #

Date/Time

124

Booking Card

TURNER, MICHAEL DALE

Print Date/Time: 08/05/2010 14:30 OCONEE COUNTY DETENTION CENTER
Login ID: spruitt **ORI Number** SC037023C

[Barcode]

Booking #: 2009-00001282 **Booking Date/Time:** 04/24/2009 22:52
Jacket #: 916 **Inmate #:**
Address: [Home Address Omitted] [Image]

Phone #: [Phone Number Omitted] **DOB:** [Date Of Birth Omitted] **Race:** WHITE (W)
SSN: [Social Security Number Omitted] **Age:** 33 **Sex:** MALE (M)
Hair Color: BRO **Eyes:** BLU **Height:** 5ft 7in **Weight** 170.0

Prisoner Type: SENTENCED **Incarceration Reason:** ARREST
Facility: **Pod/Block:** **Cell:** **Bed:**

Contact: TURNER, MARGIE **Relationship:** MOTHER **Phone #:** [Phone Number Omitted]
Notified By: **Date/Time:**

Charge:
SC037013D 9059 F/C BENCH WARRANT FAMILY COURT BENCH WARRANT
Offense/Charge Date: 04/24/2009 20:58 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: **Bond/Bail Set Date:** **Bond/Bail Set Amt:**
Bond Posted By: **Bond Post Date:** **Bond Post Amt:**
Severest: No

Release Date/Time: 07/25/2009 00:01 **Released By:** BW5572 – WALLIS
Release Reason: TIME SERVED **Released to ORI:**
Release To:

I will have opportunity to contact family or counsel

Inmate Signature

Booking Officer(s): # #

Reviewed By: #

Date/Time

Booking Card

TURNER, MICHAEL DALE

Print Date/Time: 08/05/2010 14:29 OCONEE COUNTY DETENTION CENTER
Login ID: spruitt **ORI Number** SC0370230

[Barcode]

Booking #: 2010-00003537 **Booking Date/Time:** 02/19/2010 23:51
Jacket #: 916 **Inmate #:**
Address: [Home Address Omitted] [Image]

Phone #: [Phone Number Omitted] **DOB:** [Date Of Birth Omitted] **Race:** WHITE (W)
SSN: [Social Security Number Omitted] **Age:** 33 **Sex:** MALE (M)
Hair Color: BRO **Eyes:** BLU **Height:** 5ft 7in **Weight** 170.0 lbs

Prisoner Type: PRETRIAL **Incarceration Reason:** ARREST
Facility: **Pod/Block:** **Cell:** **Bed:**

Contact: BRAMLET, REGINA **Relationship:** SPOUSE **Phone #:**
Notified By: **Date/Time:**

Charge: DUS/DRIVING UNDER SUSPENSION, LICENSE
State: 5499 56-01-0460(A)(1)(a) NOT SUSPENDED FOR DUI - 1ST OFFENSE
Offense/Charge Date: 02/19/2010 23:00 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: PR **Bond/Bail Set Date:** 02/20/2010 08:26 **Bond/Bail Set Amt:** $652.50
Bond Posted By: **Bond Post Date:** 02/20/2010 08:27 **Bond Post Amt:** $652.50
Severest: No

Charge:
State: 5499 56-05-1810 TRAFFIC/DRIVING ON WRONG SIDE OF ROAD
Offense/Charge Date: 02/19/2010 23:00 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: PR **Bond/Bail Set Date:** 02/20/2010 08:28 **Bond/Bail Set Amt:** $237.50
Bond Posted By: **Bond Post Date:** 02/20/2010 08:28 **Bond Post Amt:** $237.50
Severest: No

Charge: TRAFFIC/SEATBELT VIOLATION - NON-
State 5499 56-05-6520 CRIMINAL SEAT BELT VIOLATION
Offense/Charge Date: 02/19/2010 23:00 **Warrant Number:** **Court Date/Time:**
Case Tracking ORI: **Case Tracking #:** **Docket Number:**
Bond/Bail Set Type: PR **Bond/Bail Set Date:** 02/20/2010 08:27 **Bond/Bail Set Amt:** $25.00
Bond Posted By: **Bond Post Date:** 02/20/2010 08:28 **Bond Post Amt:** $25.00
Severest: No

Charge: DRUGS/MANUF., POSS. OF OTHER SUB. IN SCH. I, II, III, OR FLUNITRAZEPAM OR ANALOGUE W.I.T.D. – 1ST OFFENSE
State: 35A 44-53-0370(b)(2)(1)

Offense/Charge Date: 02/20/2010 08:09	**Warrant Number:**	**Court Date/Time:**
Case Tracking ORI:	**Case Tracking #:**	**Docket Number:**
Bond/Bail Set Type: PR	**Bond/Bail Set Date:** 02/20/2010 08:27	**Bond/Bail Set Amt:** $5000.00
Bond Posted By:	**Bond Post Date:** 02/20/2010 08:29	**Bond Post Amt:** $5,000.00

Severest: No

Charge: DRUGS/ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE
State: 35A 44-53-0370(B)

Offense/Charge Date: 02/20/2010 08:09	**Warrant Number:**	**Court Date/Time:**
Case Tracking ORI:	**Case Tracking #:**	**Docket Number:**
Bond/Bail Set Type: PR	**Bond/Bail Set Date:** 02/20/2010 09:59	**Bond/Bail Set Amt:** $15000.00
Bond Posted By:	**Bond Post Date:** 02/20/2010 10:00	**Bond Post Amt:** $15,000.00

Severest: No

Charge: DRUGS/MANUF., DIST., OR POSSESSION W.I.T.D. SCHEDULE IV DRUGS, EXCEPT FLUNITRAZEPAM – 1ST OFFENSE
State 35A 44-53-0370(b)(3)1

Offense/Charge Date: 08/24/2009 08:36	**Warrant Number:**	**Court Date/Time:**
Case Tracking ORI:	**Case Tracking #:**	**Docket Number:**
Bond/Bail Set Type: SURETY	**Bond/Bail Set Date:** 02/20/2010 11:35	**Bond/Bail Set Amt:** $10000.00
Bond Posted By:	**Bond Post Date:** 02/20/2010 14:00	**Bond Post Amt:** $10,000.00

Severest: No

Release Date/Time:	02/21/2010 14:04	**Released By:**	RR4452 – ROHLETTER
Release Reason:	POSTED BOND	**Released to ORI:**	
Release To:			

I will have opportunity to contact family or counsel

Inmate Signature: _____

Booking Officer(s): # _____ # _____

Reviewed By: # _____

_____

_____

Date/Time

POWER AMOUNT
$ 11,000.00

Accredited

POWER NO AB-00482006

FILED IN OFFICE
BEVERLY H. WHITFIELD
CLERK OF COURT
2010 MAR -2 P 2:48

POWER OF ATTORNEY: KNOW ALL MEN BY THESE PRESENTS that Accredited Surety and Casualty Company, Inc., a corporation duly organized and existing under the laws of the State of Florida, has made pursuant to a Code of its By-Laws adopted by the Directors of the said Company on the 31st day of August, 1971 and now in effect, does constitute and appoint and by these presents does make, constitute and appoint below named agent its true and lawful Attorney in Fact by it and in its name, place and stead to execute, seal and deliver for and on its behalf and as its act and deed, as surety, a bail bond only. Authority of such Attorney-in-Fact is limited to APPEARANCE BONDS ONLY and cannot be construed to guarantee payment of fines, costs, attorney, wage claims or any other financial obligation, nor delivery on behalf of below named defendant. Not valid if used in connection with federal or immigration Bonds

This Power-of-Attorney is void if altered or erased, void if used with other powers of this company or in combination with powers from any other surety company. This Power-of-Attorney is void if used to furnish bail in excess of the stated face amount of this power, and can only be used once. The obligation of the company shall not exceed the sum of

ELEVEN THOUSAND ($11,000.00) DOLLARS

and is provided this Power-of-Attorney is filed with the bond and retained as a part of the Court records. The said Attorney-In-Fact is hereby authorized to insert in this Power-of-Attorney the name of the person on whose behalf this bond was given.

IN WITNESS WHEREOF ACCREDITED SURETY AND CASUALTY COMPANY, INC., has caused these presents to be signed by its duly authorized officer proper for the purpose and its corporate seal to be hereunto affixed this 21st day of February 20 10

Bond Amount 10,000.00 Appearance Date 3.26.2010 9:30

Defendant Michael Dale Turner

Court Sessions City Westminster State SC

Case # I 591291

Offense Distribution of Marijuana

Executing Agent Kathy Henderson

ACCREDITED SURETY AND CASUALTY COMPANY, INC.

VOID IF NOT ISSUED BY: 12/31/2010

DEBORAH JALLAD
PRESIDENT

NOT VALID FOR IMMIGRATION OR FEDERAL BONDS

WARNING: THIS FORM CONTAINS A WATERMARK, UV FIBERS AND MICROPRINT SIGNATURE LINE

ARREST WARRANT
J-452853

STATE OF SOUTH CAROLINA
☐ County/☒ Municipality of SENECA

THE STATE

against

TURNER, MICHAEL DALE
Address: [Home Address Omitted]

Phone: [Phone Number Omitted]
SSN: [Social Security Number Omitted]
Sex: M Race: W Height: 507 Weight: 170
DL State: SC DL#: [Drivers License Omitted]
DOB: [Date Of Birth Omitted]
Agency ORI #: SC0370100
Prosecuting Agency: CITY
Prosecuting Officer: JOHN CRUM
Offense: DIST. CONTROLLED SUBSTANCE – Offense Code: 44-53-370
Code/Ordinance Sec. 44-53-370(B)(3)

This warrant is **CERTIFIED FOR SERVICE** in the ☒ County/☒ Municipality of OCONEE/SENECA. The Accused is to be arrested and brought before me to be dealt with according to law.

/s/ [Illegible] **(L.S.)**
Signature of Judge

Date: 12-7-09

RETURN

A copy of this arrest warrant was delivered to defendant Michael Dale Turner on 2-20-10 .

/s/ BJ McClure
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

DANNY SINGLETON
225 E. N. 1ST STREET
Seneca, SC 29678

AFFIDAVIT

(Filed Feb. 26, 2010)

STATE OF SOUTH CAROLINA	)	Form Approved by S.C. Attorney General April 21, 2003 SCCA 618
☐ County/☒ Municipality of SENECA	)	

Personally appeared before me the affiant CRUM, JOHN who being duly sworn deposes and says that defendant TURNER, MICHAEL DALE did within this county and state on 09/23/2009 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/☒ Municipality of SENECA) in the following particulars:

DESCRIPTION OF OFFENSE:
DIST. CONTROLLED SUBSTANCE – 44-53-370(B)(3)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT, MICHAEL DALE TURNER DID KNOWINGLY, INTENTIONALLY AND WITHOUT AUTHORIZATION, DISTRIBUTE A QUANTITY OF [Xanax DS] A SCHEDULE IV CONTROLLED SUBSTANCE. THIS DISTRIBUTION WAS MADE TO AN UNDERCOVER OPERATIVE WORKING AT THE DIRECTION OF THE SENECA POLICE DEPARTMENT. THIS DID OCCUR AT 12020 N. RADIO STATION ROAD WITHIN THE CITY OF SENECA AND THERE IS A WRITTEN REPORT ON FILE WITH THE SENECA POLICE DEPARTMENT, CASE NO. 09001470.

Signature of Affiant /s/ John Crum
Affiant's Address [Home Address Omitted]
SENECA, SC 29678
Affiant's Telephone [Phone Number Omitted

STATE OF SOUTH CAROLINA)
☐ County/☒ Municipality of SENECA)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 09/23/2009

defendant TURNER, MICHAEL DALE
did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/☒ Municipality of SENECA) as set forth below:

DESCRIPTION OF OFFENSE:
DIST. CONTROLLED SUBSTANCE – 44-53-370(B)(3)

[A TRUE COPY
AUG 31 2010 BW]

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me on December 2, 2009

/s/ [Illegible] **(L.S.)**
Signature of Issuing Judge
Judge Code: 421

ORIGINAL

Judge's Address 225 E. N. 1ST STREET
SENECA SC 29678
Judge's Telephone 864-885-2731

[Entered
Computer LB]

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

STATE OF SOUTH CAROLINA)
)
COUNTY OF Oconee)
STATE)
VS.)
Mr. Michael Dale Turner)
AKA:)
Race: W Sex: M Age: 33)
DOB: [Date Of Birth Omitted])
SS#: [Social Security Number Omitted])
Address: [Home Address Omitted])
City, State, Zip:)
DL# [Drivers License Omitted]* SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐
Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 10-GS-37-610

A/W#: J452853
Date of Offense: 9/23/2009
S.C. Code §: 44-53-0370(b)(3)
CDR Code #: 0189

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: Drugs/Manuf., poss. of Sch. IV drugs, except flunitrazepam, with intent to distribute – 1st offense

In violation of § 44-53-0370(b)(3) of the S.C. Code of Laws, bearing CDR Code # 0189

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS
☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45 (CSC w/minor 1st or Lewd Act)

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

_____ (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

/s/ L.S. Simmons	70224	/s/ Michael Turner
Solicitor	SC Bar #	Defendant
/s/ NGS		5143
Attorney for Defendant		SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ ~~**County Detention Center**~~, for a determinate term of 3 ~~days/months~~/years or ☐ ~~under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____~~; provided that upon the service of 3 days [TD] ~~days/months/years~~ and ~~or~~ payment of $ _____; ~~plus~~ costs and assessments as applicable*; the balance is suspended with **probation** for 1 ~~months~~/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 3 days [TD]

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered PTUP** _____

Total: $ _____ plus 20% fee: _____ $ _____

_____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

*Fine:		$	
§14-1-206 (Assessments 107.5%)		$	
§14-1-211(A)(1) (Conv. Surcharge)	$100	$	100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$	
§56-5-2995 (DUI Assessment)	$12	$	
§56-1-286 (DUI Breath Test)	$25	$	
§47.12 (Public Def/Prob)	$500	$	
§14-1-212 (Law Enforce. Funding)	$25	$	25.00
§14-1-213 (Drug Court Surcharge)	$150	$	150.00
§50-21-114 (BUI Breath Test Fee)	$50	$	
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
§90.7 (SCCJA Surcharge)	$5	$	5.00
3% to County (if paid in installments)		$	8.40
TOTAL		$	288.40

Clerk of Court/Deputy Clerk /s/ Beverly Whitfield

Court Reporter: /s/ Robin Hild

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ Beginning _____

$ _____ Paid to Public Defender Fund

Other: _____

_____

_____

_____

_____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Presiding Judge	A. Macaulay
Judge Code:	63
Sentence Date	11/18/10

_____

ARREST WARRANT
J-452854

STATE OF SOUTH CAROLINA

☐ County/☒ Municipality of SENECA

THE STATE

against

TURNER, MICHAEL DALE
Address: [Home Address Omitted]

Phone: [Phone Number Omitted]
SSN: [Social Security Number Omitted]
Sex: M Race: W Height: 507 Weight: 170
DL State: SC DL#: [Drivers License Omitted]
DOB: [Date Of Birth Omitted]
Agency ORI #: SC0370100
Prosecuting Agency: CITY
Prosecuting Officer: TIM HUNNICUTT
Offense: DIST. CONTROLLED SUBSTANCE –
Offense Code: 44-53-370
Code/Ordinance Sec. 44-53-370(B)(3)

This warrant is **CERTIFIED FOR SERVICE** in the ☒ County/☐ Municipality of OCONEE. The Accused is to be arrested and brought before me to be dealt with according to law.

/s/ [Illegible] **(L.S.)**
Signature of Judge

Date: 12-7-09

RETURN

A copy of this arrest warrant was delivered to defendant Michael Dale Turner
on 2-20-10 .

/s/ BJ McClure
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

DANNY SINGLETON
225 E. N. 1ST STREET
Seneca, SC 29678

AFFIDAVIT

(Filed Feb. 26, 2010)

STATE OF SOUTH CAROLINA	Form Approved by S.C. Attorney General April 21, 2003 SCCA 618
☐ County/☒ Municipality of SENECA	

Personally appeared before me the affiant
HUNNICUTT, TIM who
being duly sworn deposes and says that defendant
TURNER, MICHAEL DALE
did within this county and state on 08/24/2009
violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/☒ Municipality of SENECA) in the following particulars:

DESCRIPTION OF OFFENSE:
DIST. CONTROLLED SUBSTANCE – 44-53-370(B)(3)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT, MICHAEL DALE TURNER DID KNOWINGLY, INTENTIONALLY AND WITHOUT AUTHORIZATION, DISTRIBUTE A QUANTITY OF [Xanax DS] A SCHEDULE IV CONTROLLED SUBSTANCE. THIS DISTRIBUTION WAS MADE TO AN UNDERCOVER OPERATIVE WORKING AT THE DIRECTION OF THE SENECA POLICE DEPARTMENT. THIS DID OCCUR AT 207 OCONEE SQUARE WITHIN THE CITY OF SENECA AND THERE IS A WRITTEN REPORT ON FILE WITH THE SENECA POLICE DEPARTMENT, CASE NO. 09001296.

Signature of Affiant /s/ Tim Hunnicutt
Affiant's Address [Home Address Omitted]
SENECA, SC 29678
Affiant's Telephone [Phone Number Omitted]

STATE OF SOUTH CAROLINA)
☐ County/☒ Municipality of SENECA)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 08/24/2009

defendant TURNER, MICHAEL DALE
did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/☒ Municipality of SENECA) as set forth below:

DESCRIPTION OF OFFENSE:
DIST. CONTROLLED SUBSTANCE – 44-53-370(B)(3)

[A TRUE COPY
AUG 31 2010 BW]

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me)
on December 2, 2009)
/s/ [Illegible] **(L.S.)**)
Signature of Issuing Judge)
Judge Code: 421)
)

ORIGINAL

Judge's Address 225 E. N. 1ST STREET
SENECA SC 29678
Judge's Telephone 864-885-2731

[Entered
Computer LB]

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

STATE OF SOUTH CAROLINA)
)
COUNTY OF Oconee)
STATE)
VS.)
Mr. Michael Dale Turner)
AKA:)
Race: W Sex: M Age: 33)
DOB: [Date Of Birth Omitted])
SS#: [Social Security Number Omitted])
Address: [Home Address Omitted])
City, State, Zip:)
DL# [Drivers License Omitted]* SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐
Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 10-GS-37-609

A/W#: J452854
Date of Offense: 8/24/2009
S.C. Code §: 44-53-0370(b)(3)
CDR Code #: 0189

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: Drugs/Manuf., poss. of Sch. IV drugs, except flunitrazepam, with intent to distribute – 1st offense

In violation of § 44-53-0370(b)(3) of the S.C. Code of Laws, bearing CDR Code # 0189

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS
☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45 (CSC w/minor 1st or Lewd Act)

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

_____ (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

/s/ L.S. Simmons	70224	/s/ Michael Turner
Solicitor	SC Bar #	Defendant
/s/ NGS		5143
Attorney for Defendant		SC Bar #

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections** ~~☐ **County Detention Center**~~, for a determinate term of 3 ~~days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____~~; provided that upon the service of 3 days/~~months/years~~ and ~~or~~ payment of $ _____; ~~plus~~ costs and assessments as applicable*; the balance is suspended with **probation** for 1 ~~months~~/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 3 days [TD]

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered PTUP** _____

Total: $ _____ plus 20% fee: _____ $ _____

_____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. ☑ _____

Recipient: _____

*Fine:		$	
§14-1-206 (Assessments 107.5%)		$	
§14-1-211(A)(1) (Conv. Surcharge)	$100	$	100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$	
§56-5-2995 (DUI Assessment)	$12	$	
§56-1-286 (DUI Breath Test)	$25	$	
§47.12 (Public Def/Prob)	$500	$	500.00
§14-1-212 (Law Enforce, Funding)	$25	$	25.00
§14-1-213 (Drug Court Surcharge)	$150	$	150.00
§50-21-114 (BUI Breath Test Fee)	$50	$	
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
§90.7 (SCCJA Surcharge)	$5	$	5.00
3% to County (if paid in installments)		$	23.40
TOTAL		$	803.40

Clerk of Court/Deputy Clerk /s/ Beverly Whitfield

Court Reporter: /s/ Robin Hild

May serve W/E beginning _____

Substance Abuse Counseling ☑

Random Drug/Alcohol Testing ☑

Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ Beginning _____

$ _____ Paid to Public Defender Fund

Other: _____

_____

_____

_____

_____

☑ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Presiding Judge A. Macaulay

Judge Code: 63

Sentence Date 11/18/10

[☑ D/L]

_____

N-140076

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of Oconee

THE STATE

against

Michael Dale Turner
Address: [Home Address Omitted]

Phone: [Phone Number Omitted]
SSN: [Social Security Number Omitted]
Sex: M Race: W Height: ____ Weight: ____
DL State: SC DL#: [Drivers License Omitted]
DOB: [Date Of Birth Omitted]
Agency ORI #: SCSHP0000
Prosecuting Agency: S C Highway Patrol
Prosecuting Officer: J A Hamilton – 2101
Offense: Drugs/Manuf., poss. of other sub. in Sch. I,II,III or flunitrazepam or analogue, w.i.t.d. – 1st offense
Offense Code: 0186
Code/Ordinance Sec: 44-53-370(b)(2)

This warrant is **CERTIFIED FOR SERVICE** in the ☐ County/☐ Municipality of _____.
The accused is to be arrested and brought before me to be dealt with according to law.

_____ **(L.S.)**
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant Michael Dale Turner
on 02-20-10

/s/ [Illegible]
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Bond Court
300 South Church St.
Walhalla, SC 29691

AFFIDAVIT

(Filed Feb. 24, 2010)

☒ County/☐ Municipality of Oconee

) **ORIGINAL**
) S.C. Attorney General
) April 21, 2003
) SCCA 518

Personally appeared before me the affiant
J A Hamilton who
being duly sworn deposes and says that defendant
Michael Dale Turner
did within this county and state on or about 02/19/2010 violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/☐ Municipality of Oconee) in the following particulars:

DESCRIPTION OF OFFENSE
Drugs/Manuf., poss. of other sub. in Sch. I,II,III or flunitrazepam or analogue, w.i.t.d. – 1st offense

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT DID, ON 02-19-10, KNOWINGLY, INTENTIONALLY AND WITHOUT THE AUTHORITY TO DO SO, POSSESS A QUANTITY OF LORTAB (HYDROCONE), A SCHEDULE III CONTROLLED SUBSTANCE. THIS INCIDENT OCCURRED AT COFFEE ROAD, WALHALLA, SC IN OCONEE COUNTY AND WAS INVESTIGATED BY SOUTH CAROLINA HIGHWAY PATROL, L/CPL M.B. LUSK.

Signature of Affiant /s/ [Illegible]
Affiant's Address [Home Address Omitted]
Greenville 29607-
Affiant's Telephone [Phone Number Omitted]

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of Oconee

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 2/19/2010 defendant Michael Dale Turner did violate the criminal laws of the State of South

Carolina (or ordinance of ☒ County/☐ Municipality of Oconee) as set forth below:

DESCRIPTION OF OFFENSE:
Drugs/Manuf., poss. of other sub. in Sch. I,II,III or flunitrazepam or analogue, w.i.t.d. – 1st offense

[A TRUE COPY
AUG 31 2010 BW]

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me)
on 02/20/2010)

/s/ [Illegible] **(L.S.)**)
Signature of Issuing Judge)
Blake A. Norton)
Judge Code: 5033)

ORIGINAL

Judge's Address 208 Booker Drive
Walhalla, SC 29691-2278
Judge's Telephone (864)638-4125

[Entered
Computer LB]

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

STATE OF SOUTH CAROLINA)
)
COUNTY OF Oconee)
STATE)
VS.)
Mr. Michael Dale Turner)
AKA:)
Race: W Sex: M Age: 33)
DOB: [Date Of Birth Omitted])
SS#: [Social Security Number Omitted])
Address: [Home Address Omitted])
City, State, Zip:)
DL# [Drivers License Omitted]* SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐
Hazmat Yes ☐ No ☐

3 on 1 prob

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 10-GS-37-608

A/W#: N140076
Date of Offense: 2/19/2010
S.C. Code §: 44-53-0370(b)(2)
CDR Code #: ~~0186~~ 0179

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: Drugs/~~Manuf.~~ [LSS] poss. of other sub. in Sch. I,II,III or flunitrazepam or analogue, ~~w i t d~~ [LSS] - 1st offense

In violation of § 44-53-0370~~(b)(2)~~ [LSS] of the S.C. Code of Laws, bearing CDR Code # ~~0186~~ [LSS] 0179

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS
☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45 (CSC w/minor 1st or Lewd Act)

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

_____ (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

/s/ LS Simmons	70224	/s/ Michael Turner
Solicitor	SC Bar #	Defendant
/s/ NGS		5143
Attorney for Defendant		SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ ~~**County Detention Center**~~, for a determinate term of 6 ~~days~~/months/~~years or~~ ☐ ~~under the Youthful Offender Act not to exceed~~ _____ ~~years and/or to pay a fine of~~ $ _____~~; provided that upon the service of~~ [provided upon services of 3 days TS] ~~days/months/years and or payment of~~ $ _____; plus costs and assessments as applicable*; ~~the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference~~ [Illegible]

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. ~~lewd (TD)~~ 3 days T/S

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered PTUP** _____

Total: $ _____ plus 20% fee: _____ $ _____

_____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

*Fine:		$	_____
§14-1-206 (Assessments 107.5%)		$	_____
§14-1-211(A)(1) (Conv. Surcharge)	$100	$	100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$	_____
§56-5-2995 (DUI Assessment)	$12	$	_____
§56-1-286 (DUI Breath Test)	$25	$	_____
§47-12 (Public Def/Prob)	$500	$	
§14-1-212 (Law Enforce. Funding)	$25	$	25.00
§14-1-213 (Drug Court Surcharge)	$150	$	150.00
§50-21-114 (BUI Breath Test Fee)	$50	$	_____
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
§90.7 (SCCJA Surcharge)	$5	$	5.00
3% to County (if paid in installments)		$	8.40
TOTAL		$	288.40

Clerk of Court/Deputy Clerk /s/ Beverly Whitfield
Court Reporter: /s/ Robin Hild

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: _____

_____

_____

_____

_____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Presiding Judge A. Macaulay
Judge Code: 63
Sentence Date 11/18/10

[☑ D/L]

STATE OF SOUTH CAROLINA	IN THE COURT OF GENERAL SESSIONS
COUNTY OF OCONEE	INDICTMENTS NOS: 2010-GS-37-608 2010-GS-37-609 2010-GS-37-610
STATE OF SOUTH CAROLINA PLAINTIFF, – VS – MICHAEL DALE TURNER, DEFENDANT.	TRANSCRIPT OF RECORD GUILTY PLEA/ SENTENCE NOVEMBER 18, 2010 WALHALLA, SOUTH CAROLINA

BEFORE:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.

APPEARANCES:

LINDSEY S. SIMMONS, ESQ.
ASSISTANT 10TH CIRCUIT SOLICITOR
ATTORNEY FOR THE STATE

N. GRUBER SIRES, ESQ.
ATTORNEY FOR THE DEFENDANT

ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER
POST OFFICE BOX 9
WALHALLA, SC 29691

[2] INDEX

WITNESSES	PAGE
NO WITNESSES WERE CALLED.	
STATEMENT OF FACTS BY SOLICITOR	8
SENTENCE OF THE COURT	11
CERTIFICATE OF COURT REPORTER	13

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
NO EXHIBITS WERE INTRODUCED.			

[3] ** START OF REQUESTED CERTIFIED TRANSCRIPT OF RECORD **

(WHEREUPON, THE GUILTY PLEA HEARING COMMENCED WITH ALL PARTIES BEING PRESENT AT APPROXIMATELY 4:21 P.M.)

MS. SIMMONS: MICHAEL DALE TURNER.

THE COURT: ALL RIGHT. CALL YOUR NEXT CASE, SOLICITOR.

MS. SIMMONS: THIS IS 2010-GS-37-608, '609 AND '610, *THE STATE VERSUS MICHAEL DALE TURNER*. HE IS PLEADING TO POSSESSION OF A CONTROLLED SUBSTANCE, DISTRIBUTION OF A CONTROLLED SUBSTANCE – POSSESSION AND TWO COUNTS OF DISTRIBUTION. WE WERE RECOMMENDING THREE

YEARS SUSPENDED ON ONE YEAR PROBATION. HE HAS NO PRIOR DRUG RECORD.

MR. SIRES: HE HAS BEEN IN REHAB, YOUR HONOR, AS YOU WILL NOTE.

THE COURT: YES.

ARE YOU MICHAEL DALE TURNER?

THE DEFENDANT: YES, SIR.

(WHEREUPON, THE DEFENDANT WAS SWORN BY THE COURT.)

THE COURT: WHAT'S THE MAXIMUM SENTENCE, MADAM SOLICITOR, ON POSSESSION OF LORTAB?

MS. SIMMONS: JUDGE, THAT'S SIX MONTHS AND $1,000.

THE COURT: AND POSSESSION WITH INTENT TO DISTRIBUTE DISTRIBUTE XANAX?

[4] MS. SIMMONS: SORRY, JUDGE. IT'S THREE YEARS AND $3,000.

THE COURT: THREE YEARS AND $3,000? YOU'VE GOT TWO INDICTMENTS TO THAT?

MS. SIMMONS: YES, SIR.

THE COURT: HOW OLD ARE YOU, SIR?

THE DEFENDANT: THIRTY-THREE.

THE COURT: HOW FAR HAVE YOU GONE IN SCHOOL?

THE DEFENDANT: NINTH GRADE.

THE COURT: WHAT KIND OF WORK DO YOU DO?

THE DEFENDANT: I RUN A CAR LOT.

THE COURT: ARE YOU MARRIED?

THE DEFENDANT: NO, SIR.

THE COURT: DO YOU HAVE ANY CHILDREN UNDER EIGHTEEN?

THE DEFENDANT: YES, SIR.

THE COURT: HOW MANY?

THE DEFENDANT: FOUR GIRLS.

THE COURT: AND HOW OLD ARE THEY?

THE DEFENDANT: FOURTEEN, THIRTEEN, TWELVE AND TEN.

THE COURT: WHO DO THEY LIVE WITH?

THE DEFENDANT: WITH MY EX-MOTHER-IN-LAW.

THE COURT: DO YOU CONTRIBUTE TOWARD YOUR DAUGHTERS' SUPPORT?

THE DEFENDANT: YES.

THE COURT: DO YOU DO IT VOLUNTARILY OR THROUGH [5] COURT ORDER?

THE DEFENDANT: THROUGH COURT.

THE COURT: ARE YOU UNDER THE INFLUENCE OF ANY MEDICATION, DRUGS, OR ALCOHOL AT THIS TIME?

THE DEFENDANT: NO, SIR.

THE COURT: ARE YOU AWARE OF ANY PHYSICAL, MENTAL OR EMOTIONAL PROBLEM THAT MIGHT KEEP YOU FROM UNDERSTANDING WHAT YOU ARE DOING TODAY?

THE DEFENDANT: NO, SIR.

THE COURT: YOU DO UNDERSTAND THE MAXIMUM SENTENCE FOR POSSESSION OF LORTAB IS SIX MONTHS AND A THOUSAND DOLLARS, AND POSSESSION WITH INTENT TO DISTRIBUTE XANAX IS THREE YEARS AND $3,000? SO IF I SHOULD SENTENCE YOU CONSECUTIVELY, YOU COULD BE SENTENCED TO SIX YEARS, SIX MONTHS, AND $7,000?

THE DEFENDANT: YES, SIR.

THE COURT: ALSO, THESE ARE GRADUATED OFFENSES. IN OTHER WORDS, IF YOU ARE CONVICTED OF THE SAME OR SIMILAR CRIME IN THE FUTURE, YOUR PUNISHMENT NEXT TIME WILL BE GREATER BECAUSE YOU WILL HAVE PRIOR OFFENSES?

THE DEFENDANT: YES, SIR.

THE COURT: AND IT WILL AFFECT YOUR ABILITY TO GET A DRIVER'S LICENSE IN SOUTH CAROLINA. DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

[6] THE COURT: HAVE YOU FULLY DISCUSSED ALL ASPECTS OF YOUR CASE WITH YOUR LAWYER?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU NEED ANY MORE TIME TO TALK TO YOUR LAWYER?

THE DEFENDANT: NO, SIR.

THE COURT: ARE YOU COMPLETELY SATISFIED WITH MR. SIRES' SERVICES AS YOUR ATTORNEY?

THE DEFENDANT: YES, SIR.

THE COURT: YOU DO UNDERSTAND THAT WHEN YOU PLEAD GUILTY YOU GIVE UP YOUR CONSTITUTIONAL RIGHTS?

FIRST, YOU GIVE UP YOUR RIGHT TO REMAIN SILENT. THAT IS THE RIGHT TO SAY NOTHING AT ALL. YOU CANNOT BE COMPELLED TO TESTIFY AGAINST YOURSELF OR OFFER EVIDENCE AGAINST YOURSELF. DO YOU UNDERSTAND THIS?

THE DEFENDANT: YES, SIR.

THE COURT: SECOND, YOU GIVE UP YOUR RIGHT TO A JURY TRIAL WHERE YOU WOULD BE PRESUMED TO BE INNOCENT AND ALL 12 MEMBERS OF THE JURY WOULD HAVE TO BE CONVINCED OF YOUR GUILT BEYOND A REASONABLE DOUBT BEFORE YOU COULD BE FOUND GUILTY. DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

THE COURT: THIRD, YOU GIVE UP YOUR RIGHT TO CONFRONT, THAT IS, THE RIGHT TO SEE, HEAR AND CROSS-EXAMINE ANY WITNESSES CALLED AGAINST YOU AS WELL AS [7] YOUR RIGHT TO CALL AND PRESENT WITNESSES ON YOUR OWN BEHALF. DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU UNDERSTAND THAT WHEN YOU PLEAD GUILTY, YOU WAIVE OR GIVE UP THESE CONSTITUTIONAL RIGHTS?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU UNDERSTAND WHEN YOU PLEAD GUILTY, YOU ADMIT THE TRUTH OF THE CHARGES MADE AGAINST YOU?

THE DEFENDANT: YES, SIR.

THE COURT: UNDERSTANDING, THEN, THE NATURE OF THE OFFENSES AND THE CONSEQUENCES OF A GUILTY PLEA, HOW DO

YOU WISH TO PLEAD TO EACH OF THESE CHARGES?

THE DEFENDANT: GUILTY.

THE COURT: HAS ANYONE PROMISED YOU ANYTHING OR THREATENED YOU TO GET YOU TO PLEAD GUILTY TO THESE CHARGES?

THE DEFENDANT: NO, SIR.

THE COURT: ARE YOU, IN FACT, GUILTY?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU WANT TO TELL ME WHAT YOU DID?

THE DEFENDANT: ON THE LORTABS, I HAD A BOTTLE WITHOUT THE LABEL ON IT WHEN I WAS PULLED OVER; AND THE XANAX, I WAS TRYING TO SELL THEM TO MAKE EXTRA MONEY. I KNOW IT WAS WRONG. SORRY.

THE COURT: YOU DID THE XANAX ON TWO OCCASIONS?

[8] THE DEFENDANT: YES, SIR.

THE COURT: DO YOU UNDERSTAND WHAT YOU DID WAS WRONG?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU BELIEVE YOU WOULD BE CONVICTED IF YOU STOOD TRIAL?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT, MADAM SOLICITOR, WHAT ARE THE FACTS OF THE CASE AS YOU HAVE THEM?

STATEMENT OF FACTS BY SOLICITOR:

MS. SIMMONS: ON FEBRUARY 19TH, 2010, HERE IN OCONEE COUNTY MR. TURNER DID POSSESS A QUANTITY OF LORTAB UNLAWFULLY. THEN ON AUGUST 24TH, 2009 AND SEPTEMBER 23RD OF 2009, IN OCONEE COUNTY, DISTRIBUTED XANAX TO AN UNDERCOVER OPERATIVE WORKING FOR THE SENECA POLICE DEPARTMENT.

THE COURT: DO YOU AGREE WITH THE FACTS AS STATED BY THE SOLICITOR?

THE DEFENDANT: YES, SIR.

THE COURT: PRIOR RECORD?

MS. SIMMONS: C.D.V., SIMPLE ASSAULT, AND UNDERAGE DRINKING.

THE COURT: DOES THAT ALSO SOUND ABOUT RIGHT?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT. HAS EACH AND EVERY ANSWER [9] YOU HAVE GIVEN THE COURT TODAY BEEN ABSOLUTELY TRUTHFUL?

THE DEFENDANT: YES, SIR.

THE COURT: ALL RIGHT. I FIND THERE IS A SUBSTANTIAL FACTUAL BASIS FOR THE DEFENDANT'S PLEA TO EACH OF THESE INDICTMENTS, AND THE DEFENDANT'S GUILTY PLEA IS FREELY, VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY MADE, WITH THE ADVICE AND COUNSEL OF AN ATTORNEY WITH WHOM THE DEFENDANT SAYS HE IS SATISFIED. THE DEFENDANT'S PLEAS OF GUILTY TO EACH INDICTMENT ARE ACCEPTED.

ALL RIGHT. ANYTHING FURTHER FROM THE STATE?

MS. SIMMONS: NOTHING, YOUR HONOR.

THE COURT: LET ME ASK YOU. NOW, ON POSSESSION OF LORTAB, IS THAT SIX MONTHS OR THREE YEARS?

MS. SIMMONS: I JUST CHARGED HIM UNDER THE SIX-MONTH STATUTE.

THE COURT: SIX MONTHS, ALL RIGHT.

MS. SIMMONS: IF YOU WANTED TO DO TIME SERVED ON THAT ONE, WE WOULDN'T OBJECT TO THAT.

THE COURT: ALL RIGHT. MR. SIRES, WHAT DO YOU HAVE TO SAY ON BEHALF OF MR. TURNER?

MR. SIRES: YOUR HONOR, THIS WAS THE TWO-BY-FOUR THAT GOT THE MULE'S

ATTENTION, I THINK. AS A RESULT OF THESE ARRESTS MR. TURNER WENT TO OWL'S NEST RECOVERY COMMUNITY DOWN IN FLORENCE, SOUTH CAROLINA, AND WAS DOWN THERE OVER TWO MONTHS AND COMPLETED THE PROGRAM. SINCE [10] THAT TIME I IMAGINE HE'S BEEN CLEAN – HAS HE NOT?

THE DEFENDANT: YES, SIR.

MR. SIRES: AND HE HAD A STRANGE REQUEST, YOUR HONOR. HE ASKED THAT THE COURT ORDER HIM TO GO TO VOC REHAB. HE WANTS TO GET A JOB, HE'S OUT OF A JOB RIGHT NOW, AND HE THINKS THAT VOC REHAB WILL HELP HIM WITH THIS DURING HIS PROBATIONARY PERIOD.

THE DEFENDANT: YES, SIR.

MR. SIRES: HE'S PAYING CHILD SUPPORT FOR FOUR YOUNG GIRLS. HE BUILT TIME DOWN THERE FOR THAT IN ANDERSON COUNTY, I BELIEVE.

THE DEFENDANT: THAT HURT.

MR. SIRES: SO HE WANTS TO GET CAUGHT UP ON THAT AND GET ON WITH HIS LIFE. HE'S BEEN CLEAN AND HE INTENDS TO STAY CLEAN –

THE DEFENDANT: YES, SIR.

MR. SIRES: – STAY AWAY FROM THIS STUFF.

IS THERE ANYTHING ELSE THAT YOU WOULD LIKE TO TELL THE COURT, MR. TURNER? THEY ARE RECOMMENDING A SENTENCE OF PROBATION FOR ONE YEAR.

THE DEFENDANT: NO, SIR.

THE COURT: ALL RIGHT. THE RECOMMENDATION IS THREE YEARS, SUSPENDED UPON ONE YEAR PROBATION?

MS. SIMMONS: YES, YOUR HONOR.

[11] THE COURT: MR. TURNER, ANYTHING YOU WOULD LIKE TO SAY?

THE DEFENDANT: JUST I'M SORRY. I'M TRYING TO CLEAN UP MY ACT, TRYING TO DO BETTER. IT WILL NOT HAPPEN AGAIN. IT BETTER NOT HAPPEN AGAIN.

THE COURT: HOW MUCH TIME HAVE YOU SERVED?

MR. SIRES: THREE OR FOUR DAYS HE TELLS ME NOW.

THE DEFENDANT: JUST A THURSDAY TO A SUNDAY.

MR. SIRES: THURSDAY TO SUNDAY? THURSDAY, FRIDAY, SATURDAY AND SUNDAY. FOUR DAYS.

THE COURT: ANYTHING FURTHER FROM THE STATE?

MS. SIMMONS: NO, YOUR HONOR.

THE COURT: ANYTHING ELSE, MR. TURNER?

THE DEFENDANT: NO, SIR.

SENTENCE OF THE COURT:

THE COURT: INDICTMENT NUMBER 2010-GS-37-608, THE SENTENCE OF THE COURT IS THAT THE DEFENDANT BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF SIX MONTHS, PROVIDED UPON THE SERVICE OF THREE DAYS' TIME SERVED AND PAYMENTS OF THE COSTS AND ASSESSMENTS AS APPLICABLE. THE BALANCE IS SUSPENDED.

INDICTMENT NUMBER 2010-GS-37-610, THE SENTENCE OF THE COURT IS THE DEFENDANT BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF THREE YEARS, PROVIDED UPON THE SERVICE OF THREE DAYS' TIME SERVED PLUS [12] THE PAYMENT OF COSTS AND ASSESSMENTS AS APPLICABLE. THE BALANCE IS SUSPENDED, PROBATION FOR ONE YEAR.

INDICTMENT NUMBER 2010-GS-37-609, THE SENTENCE OF THE COURT IS THE DEFENDANT BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF THREE YEARS, PROVIDED UPON THE SERVICE OF THREE DAYS' TIME SERVED PLUS PAYMENT OF

COSTS AND ASSESSMENTS AS APPLICABLE. THE BALANCE IS SUSPENDED. PROBATION FOR ONE YEAR.

ALL SENTENCES TO RUN CONCURRENT, DEFENDANT BE GIVEN CREDIT FOR THREE DAYS TIME SERVED, SPECIAL CONDITIONS OF SENTENCE IS TO ATTEND VOCATIONAL REHABILITATION, JOB CORPS, UNDERGO DRUG AND ALCOHOL TESTING AND TREATMENT AND SUBSTANCE ABUSE COUNSELING AS DIRECTED, AND PAY $500 TO THE CLERK DURING PROBATION.

MR. SIRES: THANK YOU, YOUR HONOR.

THE DEFENDANT: THANK YOU, YOUR HONOR.

THE COURT: GOOD LUCK TO YOU, SIR.

(WHEREUPON, THE GUILTY PLEA/SENTENCE WAS CONCLUDED AT APPROXIMATELY 4:38 P.M.)

** END OF REQUESTED CERTIFIED TRANSCRIPT OF RECORD **

[13] CERTIFICATE OF COURT REPORTER

I, THE UNDERSIGNED, ROBIN SUE HILD, FCRR, RPR, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND THE EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR OCONEE COUNTY, SOUTH CAROLINA, ON THE 18TH DAY OF NOVEMBER, 2010.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

DECEMBER 2, 2010

/s/ Robin Sue Hild
ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER

List of Tenth Circuit Family Court Child-Support Enforcement Cases Reviewed

In response to amicus Patterson's empirical study (Patterson et al. Br. 6-22; Ctr. for Fam. Pol'y & Practice et al. [certiorari-stage] Br. 16-19), on January 4, 2011, undersigned counsel sent a researcher to observe the family court proceedings in the Tenth Judicial Circuit, comprising Oconee and Anderson Counties, South Carolina. Every child-support civil-contempt hearing before Judges Tommy B. Edwards and Timothy M. Cain in Anderson, South Carolina was observed and data were recorded. Those cases are listed below.

Records were then reviewed in the Oconee County Courthouse. The research began with Department of Social Services (DSS) docket sheets that included but were not limited to all child-support civil-contempt hearings scheduled to be heard on the one day specifically reserved for child-support enforcement hearings each month in Oconee County between April and November 2010. Not all the hearings occurred as scheduled. Review of these case files and dockets indicated that 130 of them involved a child-support civil-contempt hearing, with a total of 144 separate hearings. (Some cases had multiple hearings, and some hearings occurred before or after the dates and months initially studied.) Those cases are listed below by hearing date. There were other pertinent cases during that time period that could not be reviewed: for example, some case files were sealed or missing.

I. HEARINGS OBSERVED

A. Hearings Before Judge Edwards

1. *Bridges* v. *Delmaro* (2007-DR-04-02366)
2. *Bumgarner* v. *Claud* (2007-DR-04-02376)
3. *Cummings* v. *Bannister* (1998-DR-04-00153)
4. *Ervin* v. *Farr* (2002-DR-04-0218)
5. *Frady* v. *Duncan* (2009-DR-04-00811)
6. *Hunt* v. *Hoover* (2010-DR-04-00328)
7. *Jones* v. *McHanney* (2010-DR-04-0023)
8. *Ledford* v. *Ledford* (2007-DR-04-01370)
9. *Lee* v. *Moon* (2010-DR-04-02628)
10. *Marvengill* v. *Marvengill* (1997-DR-04-02934)
11. *Nix* v. *Thrasher* (2002-DR-04-911)
12. *Oglesby* v. *Jones* (2007-DR-04-02486)
13. *Pressley* v. *Jones* (1993-DR-04-2243)
14. *Roberts* v. *Roberts* (2001-DR-04-00268)
15. *Scott* v. *Cowan* (2009-DR-04-00068)
16. *Seawright* v. *Thrasher* (2002-DR-04-911)
17. *Stewart* v. *Stewart* (2010-DR-04-00123)
18. *Trotter* v. *Miller* (1999-DR-04-00263)
19. *Turman* v. *Johnson* (2007-DR-04-00068)
20. *Walton* v. *Willis* (2008-DR-04-00594)
21. *Young* v. *Carver* (2007-DR-04-1760)
22. *Young* v. *Holden* (1998-DR-04-1660)

B. **Hearings Before Judge Cain**

1. *Agraddick* v. *Williams* (2000-DR-04-00658)

2. *Alexander* v. *Holcomb* (2009-DR-04-02070)

3. *Bagwell* v. *Bagwell* (2009-DR-04-02657)

4. *Barnard* v. *Barnard* (2009-DR-04-00450)

5. *Bishop* v. *Burdick* (2005-DR-04-1272)

6. *Brown* v. *Fielding* (2008-DR-04-00788A)

7. *Brown* v. *Parnell* (2004-DR-04-1200)

8. *Burkett* v. *Burkett* (2004-DR-04-003798)

9. *Cartee* v. *Cartee* (2007-DR-04-02744)

10. *Check* v. *Check* (2006-DR-04-00056)

11. *Cox* v. *McAlister* (2010-DR-04-01491)

12. *Currens* v. *Gibbons* (2010-DR-04-00097)

13. *Dotson* v. *Anderson* (1995-DR-04-02003)

14. *Duncan* v. *Duncan* (2010-DR-04-1950)

15. *Edmonson* v. *Edmonson* (2003-DR-04-02358)

16. *Edwards* v. *Edwards* (2006-DR-04-1026)

17. *Eggenberg* v. *Eggenberg* (2010-DR-04-01072)

18. *Fielding* v. *Fielding* (2008-DR-04-00728)

19. *Fountain* v. *Fountain* (2008-DR-04-00223A)

20. *George* v. *Norwood* (2005-DR-04-00814)

21. *Haulbrook* v. *Haulbrook* (2006-DR-04-2482)

22. *Hembree* v. *Hembree* (2004-DR-04-2130)

23. *Hendricks* v. *Hedricks* (2008-DR-04-02107)

24. *Hunter* v. *Love* (2007-DR-04-022532)

25. *Jeffodat* v. *Dickson* (2000-DR-04-1947)

26. *Jordan* v. *Hix* (1998-DR-04-00111)

27. *Josey* v. *Josey* (2008-DR-04-02759)

28. *Lambert* v. *Cuyar* (2004-DR-04-00516)

29. *Lewis* v. *Lewis*
(2010-DR-04-00589)

30. *Lo* v. *Hayes*
(2010-DR-0401790)

31. *Marvengill* v. *Marvengill*
(2005-DR-04-00186)

32. *Mason* v. *Creamer*
(2005-DR-04-02468)

33. *McNeill* v. *McNeill*
(2008-DR-04-00732)

34. *Nelson* v. *Plunk*
(2002-DR-04-02579)

35. *Obanks* v. *Neal*
(2007-DR-04-00598)

36. *Parker* v. *Jackson*
(2009-DR-04-00623)

37. *Patterson* v. *Patterson*
(2007-DR-04-00195)

38. *Pettigrew* v. *Pettigrew*
(2002-DR-04-16068)

39. *Ridgeway* v. *Powell*
(2010-DR-04-02265)

40. *Ripley* v. *Ripley*
(2004-DR-04-00542A)

41. *Ripley* v. Carter
(2004-DR-04-00542B)

42. *Schweitzer* v. *Parker*
(2001-DR-04-01672)

43. *Teague* v. *Oakley*
(2005-DR-04-00018)

44. *Thompson* v. *Taylor*
(2008-DR-04-1493)

45. *Todd* v. *Mclean*
(2007-DR-04-02514)

46. *Tucker* v. *Hicks*
(2002-DR-04-02815)

47. *Turner* v. *Simmons*
(2010-DR-04-00865)

48. *Williams* v. *Powell*
(2006-DR-04-01765)

49. *Wood* v. *Benoir*
(2007-DR-04-2215)

II. CASE FILES REVIEWED (organized by hearing date)

DECEMBER 15, 2010

1. *Bentley* v. *Cobb* (2001-DR-37-636)
2. *Brown* v. *Clay* (2008-DR-37-227)
3. *Curry* v. *Jenkins* (2003-DR-37-985)
4. *Davis* v. *Quick* (2009-DR-37-0183)
5. *Lee* v. *Jenkins* (2007-DR-37-268)
6. *Mitchell/DSS* v. *Smith* (2009-DR-37-0780)
7. *Morton* v. *Smith* (1999-DR-37-139)
8. *Thompson/DSS* v. *Hamby* (2007-DR-37-744)
9. *Vesey/DSS* v. *Jenkins* (2009-DR-37-337)

DECEMBER 08, 2010

1. *Schwery* v. *Rogers* (2001-DR-37-0227)

NOVEMBER 23, 2010

1. *Young* v. *Simpson* (2008-DR-37-33)

NOVEMBER 17, 2010

1. *Cook* v. *Holmes* (2007-DR-37-0877)
2. *Crawford* v. *Manley* (2009-DR-37-710)
3. *DSS* v. *Watkins* (2007-DR-37-805)
4. *Finney* v. *Harris* (2004-DR-37-181)
5. *Gibbs* v. *Harris* (2002-DR-37-297)
6. *Greenlee* v. *Greenlee* (2006-DR-37-0062)

7. *Johnson* v. *Ferguson* (2000-DR-37-0428)
8. *Jones* v. *Hunter* (2004-DR-37-221)
9. *Lecroy* v. *Owens* (2010-DR-37-573)
10. *Lyda* v. *Lyda* (2004-DR-37-042)
11. *Mitchell/DSS* v. *Smith* (2003-DR-37-602)
12. *Moyles* v. *Moyles* (2001-DR-37-0767)
13. *Norton* v. *Norton* (2009-DR-37-360)
14. *Perry* v. *Perry* (2004-DR-37-684)
15. *Swaney* v. *Chapman* (2005-DR-37-449)
16. *Weeden* v. *McGuffin* (2006-DR-37-0428)

NOVEMBER 08, 2010

1. *Anders* v. *Busch* (2010-DR-37-705)
2. *Smith* v. *Cantrell* (2010-DR-37-228)

OCTOBER 27, 2010

1. *Alexander* v. *Stancil* (2003-DR-37-367)
2. *Blackwell* v. *Crumpton* (2007-DR-37-0644)
3. *Blasingame* v. *Jimenez* (2009-DR-37-0629)
4. *Bort* v. *Bort* (1992-DR-37-0781)
5. *Bradley* v. *Blassingame* (2009-DR-37-080)
6. *Brinkley* v. *Trotter* (2010-DR-37-140)
7. *Clegg* v. *Carnell* (1998-DR-37-0228)
8. *Dickard* v. *Bentley* (2006-DR-37-0744)
9. *DSS* v. *Elrod* (2004-DR-37-65)
10. *Ellis* v. *Ellis* (2010-DR-37-493)
11. *Fowler* v. *Dobson* (2005-DR-37-0778)
12. *Harbert* v. *Allred* (2009-DR-37-715)

13. *Key* v. *Brown* (2009-DR-37-0295)

14. *Keyes* v. *Carnell* (1998-DR-37-0639)

15. *McGuire* v. *Holbrooks* (2001-DR-37-0804)

16. *Miles* v. *Goodine* (1999-DR-37-0861)

17. *Moyles* v. *Moyles* (2001-DR-37-0525)

18. *Peeler* v. *Earle* (2010-DR-37-501)

19. *Roach* v. *Norton* (2009-DR-37-0133)

20. *Sanford* v. *Evans* (2009-DR-37-822)

21. *Smith* v. *Massey* (2009-DR-37-0133)

22. *Streater* v. *Blassingame* (2009-DR-37-080)

23. *Tyler* v. *Cox* (2009-DR-37-659)

24 *Vereb* v. *Armstrong* (2007-DR-37-454)

25. *Walker* v. *Cannon* (1995-DR-37-0937)

26. *Weeden* v. *Roach* (2006-DR-37-838)

27. *Wilson* v. *Davis* (2010-DR-37-434)

OCTOBER 06, 2010

1. *Atkinson* v. *Burdette* (2007-DR-37-0330)

2. *Daugherty* v. *Pearson* (2008-DR-37-0467)

3. *Jackson* v. *Chrisley* (2009-DR-37-521)

4. *Moore* v. *Hart* (2004-DR-37-136)

5. *Roller* v. *Hart* (2008-DR-37-43)

SEPTEMBER 28, 2010

1. *Serano* v. *Smith* (2000-DR-37-352)

SEPTEMBER 15, 2010

1. *Gosnell* v. *Gosnell*
(2006-DR-37-492)

2. *Partin* v. *Harbin*
(2005-DR-37-0530)

3. *Patterson* v. *Cowart*
(2006-DR-37-529)

SEPTEMBER 08, 2010

1. *Perry* v. *Anderson*
(2006-DR-37-217)

AUGUST 25, 2010

1. *Breazeale* v. *Breazeale*
(2004-DR-37-771)

2. *Burrell* v. *Patterson*
(2006-DR-37-818)

3. *Chappell* v. *Mayes*
(2009-DR-37-377)

4. *DSS* v. *Hamby*
(2010-DR-37-701)

5. *Goodine* v. *Miller*
(2001-DR-37-609)

6. *Hamby* v. *Goodman*
(2009-DR-37-225)

7. *Lawrence* v. *Wood*
(2006-DR-37-315)

8. *Rickmon* v. *Haymond*
(2004-DR-37-461)

9. *Schwary* v. *Rogers*
(2001-DR-37-0227)

10. *Smith* v. *Green*
(2007-DR-37-0817)

11. *Thompson* v. *Suttles*
(2006-DR-37-823)

AUGUST 18, 2010

1. *Hyde* v. *Hyde*
(2002-DR-37-550)

JULY 23, 2010

1. *Streater* v. *Blassingame*
(2010-DR-37-0132)

JULY 15, 2010

1. *Bagwell* v. *Byrd*
(2008-DR-37-0401)

2. *Gilstrap* v. *Carver*
(2002-DR-37-524)

3. *Hamby* v. *Goodman*
(2009-DR-37-225)

4. *Perry* v. *Perry*
(2004-DR-37-684)

JULY 07, 2010

1. *Blassingame* v. *Jimenez*
(2009-DR-37-0629)

JUNE 23, 2010

1. *Addis* v. *Halbrooks*
(2008-DR-37-192)

2. *Fricks* v. *Montjoy*
(1990-DR-37-0526)

3. *Hambey* v. *Foskey*
(2009-DR-37-00224)

4. *Godsmith* v. *Purdessy*
(2007-DR-37-0421)

5. *Marks* v. *Maxwell*
(2003-DR-37-0785)

6. *Mathis* v. *Mathis*
(2004-DR-37-379)

7. *Nicholson* v. *McCoy*
(2005-DR-37-693)

8. *Scruggs* v. *Scruggs*
(2009-DR-37-781)

9. *Shead* v. *Wright*
(2009-DR-37-527)

10. *Stancil* v. *Jackson*
(2002-DR-37-965)

11. *West* v. *Goss*
(2004-DR-37-309)

12. *Wood* v. *Guthrie*
(2007-DR-37-0716)

JUNE 18, 2010

1. *Norton* v. *Robinson*
(1991-DR-37-139)

JUNE 14, 2010

1. *Manly* v. *Bonecutter*
(2003-DR-37-0549)

MAY 19, 2010

1. *Atkinson* v. *Burdette*
(2007-DR-37-0330)
2. *Bagwell* v. *Byrd*
(2008-DR-37-0401)
3. *Davis* v. *Quick*
(2009-DR-37-0183)
4. *Dodson* v. *Greenlee*
(2010-DR-37-037)
5. *Drake* v. *Gorton*
(2010-DR-37-037)
6. *Fisher* v. *Cannon*
(2007-DR-37-0880)
7. *Haymon* v. *Earle*
(1997-DR-37-366)
8. *Newton* v. *Owens*
(2006-DR-37-0052)
9. *Odell* v. *Fretwell*
(2009-DR-37-719)
10. *Taylor* v. *Jenkins*
(2010-DR-37-122)

MAY 17, 2010

1. *Hendrix* v. *Arnold*
(1997-DR-37-974)

MAY 05, 2010

1. *Schwery* v. *Rogers*
(2001-DR-37-0227)

MAY 03, 2010

1. *Bennett* v. *Mote*
(1999-DR-37-0456)

April 28, 2010

1. *Blassingame* v. *Holland* (2004-DR-37-887)
2. *Brooks* v. *Brooks* (2009-DR-37-595)
3. *Cade* v. *Clinksales* (2010-DR-37-131)
4. *Case* v. *Goodine* (2009-DR-37-0297)
5. *Crumpton* v. *Blackwell* (2005-DR-37-0876)
6. *Harden* v. *Craig* (2006-DR-37-413)
7. *Lee* v. *Jenkins* (2007-DR-37-268)
8. *Poole* v. *Cole* (2005-DR-37-521)
9. *Reese* v. *Crespo* (2008-DR-37-217)
10. *Smith* v. *Holland* (2007-DR-37-0815)
11. *Swafford* v. *Evans* (2009-DR-37-652)

April 07, 2010

1. *Fassett* v. *Cambell* (2006-DR-37-739)

March 31, 2010

1. *Jordan* v. *Carson* (1995-DR-37-0649)

February 17, 2010

1. *Crumpton* v. *Blackwell* (2007-DR-37-0644)
2. *DSS* v. *Floyd* (2006-DR-37-831)
3. *Elliott* v. *Elliott* (2008-DR-37-860)

JANUARY 20, 2010

1. *Hunter* v. *Cambell*
(2009-DR-37-0066)

2. *Segur* v. *Carroll*
(2004-DR-37-769)

JANUARY 06, 2010

1. *Burrell* v. *Guin*
(2009-DR-37-374)

DECEMBER 09, 2009

1. *Lee* v. *Carter*
(2008-DR-37-0690)

NOVEMBER 18, 2009

1. *Jones* v. *Jones*
(2001-DR-37-63)

OCTOBER 07, 2009

1. *Atkinson* v. *Burdette*
(2007-DR-370-330)

2. *Eller* v. *Carver*
(2002-DR-37-524)

3. *Dickard* v. *Bentley*
(2006-DR-37-0744)

4. *Martin* v. *Blackwell*
(2008-DR-37-00498)

AUGUST 12, 2009

1. *Horn* v. *Winkler*
(2005-DR-37-0707)

JULY 08, 2009

1. *DSS* v. *Elliott*
(2008-DR-37-682)

JUNE 3, 2009

1. *DSS* v. *Callaway*
(2009-DR-37-254)

FEBRUARY 25, 2009

1. *DSS* v. *Church*
(2006-DR-37-743)

FEBRUARY 04, 2009

1. *Branyan* v. *Moore*
(2004-DR-37-361)

NOVEMBER 12, 2008

1. *Newton* v. *Owens*
(2006-DR-37-052)

JUNE 18, 2008

1. *Norton* v. *Robinson*
(1991-DR-37-139)

MARCH 07, 2007

1. *DSS* v. *Wood*
(2006-DR-37-315)

REPLY BRIEF

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No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. THIS CASE IS NOT MOOT 2

A. The Controversy Is Capable Of Repetition 3

B. The Issue In This Case Is Highly Likely To Evade Review 4

II. TURNER WAS ENTITLED TO APPOINTED COUNSEL 9

A. Precedent Holds That An Indigent Litigant Facing Incarceration Is Entitled To Appointment Of Counsel 9

B. There Is No Basis For Creating An Exception To This Court's Right-To-Counsel Precedent For Civil Contempt Proceedings That Result In Incarceration 11

C. A Case-By-Case Approach To The Right To Counsel Would Not Satisfy Due Process 18

D. Respondents' Slippery-Slope Arguments Fail 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Shelton*, 535 U.S. 654 (2002) 10, 23

Arrington v. *Department of Human Resources*, 935 A.2d 432 (Md. 2007) 15

Brasington v. *Shannon*, 341 S.E.2d 130 (S.C. 1986) 3

Byrd v. *Irmo High School*, 468 S.E.2d 861 (S.C. 1996) 5

Citizens United v. *FEC*, 130 S. Ct. 876 (2010) 8

Cooke v. *United States*, 267 U.S. 517 (1925) 9, 13

DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 6, 7

Demore v. *Kim*, 538 U.S. 510 (2003) 22

District Attorney's Office v. *Osborne*, 129 S. Ct. 2308 (2009) 23

Drayton v. *McCall*, 584 F.2d 1208 (2d Cir. 1978) 19

Ethredge v. *Hail*, 996 F.2d 1173 (11th Cir. 1993) 5

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 10, 11, 19

Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979) 8

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 9

Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 12

Goss v. *Lopez*, 419 U.S. 565 (1975) 19

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 9

Heck v. *Humphrey*, 512 U. S. 477 (1994) 7

Honig v. *Doe*, 484 U.S. 305 (1988) 7

TABLE OF AUTHORITIES—Continued

Page(s)

In re Decker, 471 S.E.2d 459 (S.C. 1995) 6

In re Gault, 387 U.S. 1 (1967) 9, 10, 21

In re Oliver, 333 U.S. 257 (1948) 13

International Union, United Mine Workers of America v. *Bagwell*, 512 U.S. 821 (1994) 21

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 15

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981) 9, 12, 13, 19

Maggio v. *Zeitz*, 333 U.S. 56 (1948) 3, 12, 14

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 13, 19

McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 16

McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971) 21

Medina v. *California*, 505 U.S. 437 (1992) 13

Middendorf v. *Henry*, 425 U.S. 25 (1976) 10, 19

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 8

Ordinola v. *Hackman*, 478 F.3d 588 (4th Cir. 2007) 22

Parham v. *J.R.*, 442 U.S. 584 (1979) 11, 19

Pennsylvania v. *Finley*, 481 U.S. 551 (1987) 22

Pope v. *Chew*, 521 F.2d 400 (4th Cir. 1975) 19

Powell v. *Alabama*, 287 U.S. 45 (1932) 10

Preiser v. *Rodriguez*, 411 U. S. 475 (1973) 7

Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Roe v. *Wade*, 410 U.S. 113 (1972) 7

Ross v. *Moffitt*, 417 U.S. 600 (1974) 22

Shillitani v. *United States*, 384 U.S. 364 (1966) 12

Sibron v. *New York*, 392 U.S. 40 (1968) 5

St. Pierre v. *United States*, 319 U.S. 41 (1943) 4

State v. *Passmore*, 611 S.E.2d 273 (S.C. Ct. App. 2005) 5

United States v. *Eskridge*, 445 F.3d 930 (7th Cir. 2006) 19

United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 22

United States v. *Moya*, 74 F.3d 1117 (11th Cir. 1996) 22

Vitek v. *Jones*, 445 U.S. 480 (1980) 9, 10

Walker v. *McLain*, 768 F.2d 1181 (10th Cir. 1985) 13

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 19

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 19

STATUTES, RULES, AND REGULATIONS

18 U.S.C. §3184 22

28 U.S.C. §2254(b)(1)(A) 8

42 U.S.C. §1983 7

S.C. Code Ann. §17-27-20(a) 7

TABLE OF AUTHORITIES—Continued

Page(s)

45 C.F.R. §304.23(i) 18

S.C. App. Ct. R.
Rule 241(c)(2) 5
Rule 241(d)(3)-(4) 6
Rule 241(d)(6) 6
Rule 608(b)(4) 14

S.C. Fam. Ct. R. 24 16

OTHER AUTHORITIES

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Order, *Strange* v. *South Carolina*, (S.C. Apr. 16, 2008) (unpublished) 7

IN THE

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No. 10-10

MICHAEL D. TURNER,

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REBECCA L. ROGERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR PETITIONER

Michael Turner spent a year in jail after being adjudged by a South Carolina court to be in contempt of an order to pay child support that he could not pay. The Supreme Court of South Carolina nonetheless held that Turner, "an indigent defendant," had no right to appointed counsel at the hearing. Pet. App. 2a. That decision was irreconcilable with this Court's precedent and fundamental principles of due process.

Respondents portray this case in nearly fictional terms. The contempt proceedings leading to Turner's incarceration were not a private matter between Turner and a "*pro se* mother." The machinery of the State was involved at every step. Rebecca Price assigned her right to child support to the State, as she was legally required to do because she had received public assistance benefits. Pet. Br. 8. As required by

South Carolina law in public assistance cases, the enforcement proceedings against Turner commenced automatically because he was in arrears. Pet. Br. 6-7. It was the family court and court clerk, not Ms. Price, that initiated contempt proceedings against Turner and made the minimal showing necessary to establish contempt. Pet. Br. 10-11; Pet. App. 16a-17a. Ms. Price need not even have appeared at any stage of the proceedings—though the Department of Social Services (DSS) often does.

Respondents speculate that petitioner had the ability to pay his child-support arrearage but chose not to, or that he caused his own inability through drug use or other activity. But the state supreme court resolved the constitutional question presented in this case on the assumption that Turner is "an indigent defendant." Pet. App. 2a. That premise was not disputed below, and the family court made no contrary finding. Pet. App. 6a-7a. Moreover, Turner testified to his limited means and provided the family court a copy of his disability benefit application (JA 135a-136a; Pet. Br. 11 n.7). The appropriate forum to determine whether petitioner has the ability to meet his child-support obligations is not this Court, but the family court—where petitioner could, with the assistance of counsel, have presented a defense that would have precluded his imprisonment. Petitioner was denied that assistance in this case, and in consequence was sent to jail in violation of due process.

ARGUMENT

I. THIS CASE IS NOT MOOT

Although Turner has completed the jail term imposed by the contempt order under review, his claim

fits easily into the mootness exception for cases that are capable of repetition yet evading review. Pet. Br. 20-27; *see* U.S. Br. 13-15.[1]

A. The Controversy Is Capable Of Repetition

Respondents argue (Br. 27) Turner cannot establish jurisdiction because he will not be incarcerated again for contempt unless he "'deliberately violates the [child-]support order,'" and the Court should presume he will not. Under South Carolina law, however, an arrearage alone triggers the court clerk's obligation to issue a rule to show cause. Pet. Br. 6, 25 n.14. Once the rule issues, the obligor bears the burden of proving he should not be held in contempt, and if he fails to carry that burden, he may be imprisoned without any further showing of misconduct. *Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986); *see also Maggio* v. *Zeitz*, 333 U.S. 56, 75-76 (1948). Absent appointment of counsel, it is reasonably likely Turner would not be able to meet that burden and would thus be incarcerated again, as has happened repeatedly.

Nor is there any merit to respondents' contention (Br. 27) that Turner is unlikely to face incarceration again without appointment of counsel because he has recently been assisted by pro bono counsel. The question presented does not concern the voluntary appearance of counsel, but rather an indigent's constitutional right to be informed of his right to counsel and, if he cannot afford an attorney, to have counsel appointed to

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[1] Since the filing of petitioner's opening brief, Turner has been released from incarceration on a prior contempt order, brought back before the family court at a hearing where DSS appeared through counsel, and ordered to appear again at another contempt hearing scheduled for May 4, 2011.

assist him. That an attorney has appeared voluntarily to assist Turner in certain proceedings does not ensure that counsel will appear at future hearings or that the family court will refrain from ordering incarceration in counsel's absence. *See* U.S. Br. 15-16 n.5. Respondents' rule would effectively discourage incarcerated indigents from seeking or accepting pro bono legal assistance and instead require them to continue without representation lest their right-to-counsel claims become moot. Nothing in this Court's precedent, or Article III, requires that result.

B. The Issue In This Case Is Highly Likely To Evade Review

Respondents do not dispute that a twelve-month order is ordinarily too short to be fully litigated prior to its expiration, but they nonetheless contend that this controversy does not "evade review." Respondents' assertions misconstrue this Court's precedents.

1. Citing *St. Pierre* v. *United States*, 319 U.S. 41 (1943), respondents argue (Br. 23-25) that Turner's case is moot because he did not seek a stay of the contempt order in the state courts or this Court before completing his jail term. *St. Pierre*, however, institutes no such requirement. Pet. Br. 23.[2] In *St. Pierre*, the Court considered whether a criminal defendant had saved his case from mootness, notwithstanding the expiration of his sentence, by diligently prosecuting his appeal. *See* 319 U.S. at 43. As subsequent treatment of *St. Pierre* by this Court and the courts of appeals demonstrates,

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[2] None of the cases relied on by respondents (Br. 24 n.5) cites *St. Pierre*, much less reads it to engraft an additional element onto the "capable of repetition, yet evading review" test.

this avenue of preserving a case from mootness has been eclipsed by the collateral consequences doctrine. *See Sibron* v. *New York*, 392 U.S. 40, 57 (1968); *see also, e.g., Ethredge* v. *Hail*, 996 F.2d 1173, 1176-1177 (11th Cir. 1993).

St. Pierre is also not controlling here because this case comes to this Court from a state-court system, where the elements of mootness and the requirements for obtaining a stay are not necessarily the same as those in the lower federal courts. Although a South Carolina court may grant a stay to preserve a case from mootness, *see* S.C. App. Ct. R. 241(c)(2), South Carolina law follows a "less restrictive" approach to mootness that may have made a stay unnecessary to preserve jurisdiction in Turner's case. *Byrd* v. *Irmo High Sch.*, 468 S.E.2d 861, 864 (S.C. 1996). Indeed, the Supreme Court of South Carolina decided Turner's case after his sentence had expired without noting any issue of mootness. Pet. App. 1a-5a; *see also State* v. *Passmore*, 611 S.E.2d 273, 281 (S.C. Ct. App. 2005) (challenge to expired one-year contempt sentence not moot). Respondents' argument reduces to the proposition that, even while the state courts retained jurisdiction over his case, petitioner should have sought a stay from *this* Court—before a final judgment issued from the state supreme court—to preserve *this* Court's jurisdiction in the eventuality that the state courts would rule against him. No decision of this Court suggests that such heroic efforts are needed to avoid mootness.

Respondents relatedly contend (Br. 26) that the issues in this case will not evade review because Turner could apply for a stay of a future contempt order. But respondents fail to explain why the possibility that a court might grant a stay in a *future* case means *this* case is moot. Even if an incarcerated *pro se* litigant

could anticipate the need for a stay to preserve his case from mootness and successfully file an application, granting the stay is within the court's discretion.[3] And there is no reason to believe that the stay application, any more than the contempt order itself, could be litigated before the contempt order could expire.

That is precisely the situation here. The contempt orders issued against petitioner have imposed maximum jail terms as short as 90 days to one year (Pet. Br. 22), which could well be too short to litigate a stay all the way to this Court. Finally, there is no reason to believe that the South Carolina courts would stay a future contempt order, given that the state supreme court has definitively ruled on Turner's right-to-counsel claim. *Cf. In re Decker*, 471 S.E.2d 459, 461 (S.C. 1995) (granting stay to resolve "novel question").

2. Citing *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), respondents further assert (Br. 25-26) that Turner's claim should be held moot because *other* litigants incarcerated for civil contempt could preserve the issue for this Court's review by seeking stays in their own appeals. Respondents misread *DeFunis*. In limited circumstances where a controversy was *not* likely to recur as to the complaining party, this Court has nonetheless exercised jurisdiction on the ground that complete litigation of the issue would likely be

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[3] Obtaining a stay in South Carolina requires elaborate steps, and the South Carolina rules contemplate that a stay application will be counseled. S.C. App. Ct. R. 241(d)(3)-(4) (petition must be "verified by the client" and contain "legal arguments with supporting points and authority); *id.* R. 241(d)(6) (if seeking order ex parte, "moving party's attorney" must certify efforts made to give notice).

impossible in future cases involving other parties. *See Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *see also Honig* v. *Doe*, 484 U.S. 305, 335-336 (1988) (Scalia, J., dissenting). The Court has not held the reverse—that even where there is a reasonable expectation that the complaining party himself will be subject again to the same action, jurisdiction nonetheless is defeated because another litigant might be able to obtain review of the issue in another case. *DeFunis* does not so hold. The Court dismissed that case because DeFunis's challenge was "not 'capable of repetition' so far as [DeFunis] is concerned," and, unlike *Roe*, DeFunis's constitutional claim could be raised by other litigants and decided in sufficient time in future cases. 416 U.S. at 319. That analysis does not suggest that where a controversy *is* capable of repetition yet evading review as to the very litigant before the Court, his claim may yet be moot because another party's claim in another case might not evade review.

Respondents suggest (Br. 29 n.8) that petitioner or other contemnors could avoid mootness issues by litigating the right-to-counsel question through a class-action suit under 42 U.S.C. §1983, where "relaxed mootness rules" supposedly would apply. But §1983 is not a vehicle for challenging the fact of incarceration. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973); *Heck* v. *Humphrey*, 512 U.S. 477, 481 (1994).[4] Accordingly, any

[4] Nor could Turner obtain review of his constitutional claim through a state habeas petition. *See* S.C. Code Ann. §17-27-20(a) (limiting state post-conviction review to criminal cases); Order, *Strange* v. *South Carolina* (S.C. Apr. 16, 2008) (unpublished) (petitioner incarcerated for civil contempt could not challenge contempt order through state habeas petition). Although federal habeas might have provided a suitable vehicle, Turner presumably would

such contemnor would have to complete his incarceration before bringing suit. At that point, however, respondents' mootness objections would simply transfer to the issue whether the former contemnor had standing to sue. *See O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974).

3. Finally, respondents argue (Br. 28-29) that Turner's case is moot because vacatur of the contempt order would provide Turner with "no tangible benefit." If Turner were to prevail in this appeal, however, he would have the benefit of a binding determination from this Court that he cannot be incarcerated on future civil contempt orders without representation by counsel. Turner's case thus stands on identical footing with cases in which this Court has rejected claims of mootness notwithstanding that the particular redress for which the case was litigated had already been granted or could no longer be granted. In each of those cases, the Court emphasized that the petitioner would benefit by being armed with a favorable ruling when a similar controversy arose. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979); *cf. Citizens United* v. *FEC*, 130 S. Ct. 876, 895 (2010). That is equally true here.

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have had to exhaust available state remedies, including his direct appeal, *see* 28 U.S.C. §2254(b)(1)(A), by which time the same mootness question would have arisen.

II. TURNER WAS ENTITLED TO APPOINTED COUNSEL

A. Precedent Holds That An Indigent Litigant Facing Incarceration Is Entitled To Appointment Of Counsel

In a variety of contexts, this Court has held that a defendant facing incarceration is entitled to appointed counsel. Pet. Br. 27-37. In the criminal context, that right stems from the Sixth Amendment. But this Court has made clear that the assistance of counsel is an essential requirement of due process where a defendant's liberty is at stake, *see, e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925), and that the right accordingly is not limited to "criminal prosecutions" within the meaning of the Sixth Amendment. Rather, the Court has held that the right to appointment of counsel applies also in civil proceedings that are "comparable in seriousness to a felony prosecution" because they "carry with [them] the awesome prospect of incarceration in a state institution." *In re Gault*, 387 U.S. 1, 36-37 (1967); *see also Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25-27 (1981); *Vitek* v. *Jones*, 445 U.S. 480, 493-494, 497 (1980) (plurality).[5]

Thus, as in a criminal prosecution, a defendant facing incarceration in a civil proceeding stands to lose "the most elemental of [his] liberty interests." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529-530 (2004); *see also Gault*, 387 U.S. at 36-37. And, as in a criminal prosecution, an individual defendant facing incarceration even

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[5] Respondents seek (Br. 45-46) to distinguish *Gault* on the ground that the juvenile delinquency proceeding at issue was equivalent to a criminal prosecution. As petitioner has explained (Br. 30-31 n.17), that is not so.

in a nominally civil case "requires the guiding hand of counsel," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), to identify, develop, and present his defense. *See Gault*, 387 U.S. at 36; *Vitek*, 445 U.S. at 496-497.

Respondents cite only two cases in which this Court has held the right to appointment of counsel inapplicable in proceedings leading to incarceration. Both are inapposite. In *Middendorf* v. *Henry*, 425 U.S. 25 (1976), this Court rejected Sixth Amendment and Due Process challenges to the military's use of summary courts-martial to try servicemembers for minor offenses without counsel. In doing so, however, it cited special considerations uniquely applicable to the military and the "particular deference" owed to Congress's determinations in military matters. *Id.* at 43. The Court also emphasized that servicemembers had the right to forego the summary court-martial and be tried instead at a more formal proceeding where counsel would be provided. *Id.* at 28-29, 46-48. None of these considerations applies here.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the Court held that indigent probationers are not categorically entitled to appointment of counsel in all probation revocation proceedings. *Id.* at 786-791. This holding rested in part on the recognition that probationers enjoy only the "limited due process right[s] of one who ... has been convicted of a crime." *Id.* at 789; *see also id.* at 781. As this Court has explained, the "dispositive factor" in *Gagnon* was that the probationer had previously been convicted of a felony offense, following a criminal trial in which his right to counsel was ensured, and thereafter enjoyed diminished due process rights. *Alabama* v. *Shelton*, 535 U.S. 654, 664 (2002).

Moreover, unlike the contempt hearing here—a formal judicial proceeding—the probation revocation hearings at issue in *Gagnon* were informal proceedings that took place outside the courtroom. Introducing counsel, the Court reasoned, could transform the hearing into a more formal proceeding and transform the hearing body into something "more akin to ... a judge." *Gagnon*, 411 U.S. at 787. The Court also emphasized that counsel would play little role because the ground for revocation in most cases would be the straightforward fact that the probationer had been convicted of another crime. *Id.* at 787, 789. Those considerations are absent here. Pet. Br. 35-37, 45-48; *infra* pp. 14-16. Indeed, *Gagnon* held that counsel "[p]resumptively ... should be provided" when the issues were more complex. 411 U.S. at 790-791.[6]

B. There Is No Basis For Creating An Exception To This Court's Right-To-Counsel Precedent For Civil Contempt Proceedings That Result In Incarceration

Respondents advance several reasons why a civil contempt hearing should be exempt from the general principle that a defendant facing incarceration should

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[6] Respondents' reliance (Br. 43) on *Parham* v. *J.R.*, 442 U.S. 584 (1979), is similarly misplaced. The Court there upheld procedures for committing a minor to a state mental hospital—without separately considering any right-to-counsel-claim—because the informality and inherently medical nature of such proceedings negated the need for "judicial-type" safeguards. *Id.* at 613. Moreover, the child's interests were entrusted in part to the parents' judgment, *id.* at 603-604, and a "formalized ... adversary contest" risked "significant intrusion into the parent-child relationship," *id.* at 610.

have a right to appointed counsel. There is no warrant for such an exception.

1. Respondents focus on the truism that civil contempt is not a "criminal prosecution" within the meaning of the Sixth Amendment. But as discussed, the Court has recognized that the Due Process Clause provides a right to appointed counsel for indigent defendants in *civil* proceedings that may result in incarceration. *Supra* p. 9; Pet. Br. 30-34. As *Lassiter* explained, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." 452 U.S. at 25.

Respondents' formalism is particularly misplaced in the contempt context, where an otherwise "classic civil contempt sanction" (Pet. App. 3a) becomes impermissibly punitive when imposed erroneously on an indigent defendant who lacks the ability to comply, but cannot establish his defense. *See Maggio*, 333 U.S. at 72. Civil and criminal contempts are distinguished mainly by whether the sanction serves a coercive or punitive purpose. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). But the "conditional" nature of a coercive civil contempt sanction depends on the contemnor's ability to comply with the underlying court order. *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). Where a defendant lacks that ability, the sanction—even if cloaked by a purge clause—is "purely punitive." *Maggio*, 333 U.S. at 72. In a true criminal contempt proceeding, the court could not impose a punitive sanction absent the protections applicable to such a proceeding. *See* Pet. Br. 29-30, 39-40. Incarcerating a contemnor for "civil" contempt where that sanction lacks coercive force and is purely punitive imposes the precise sanction that could not be imposed in a criminal

contempt proceeding without the defendant's having the assistance of counsel. *Cooke*, 267 U.S. at 537.[7]

This analysis does not seek to "retroactively convert" (Resp. Br. 37-38) Turner's civil contempt order into a criminal prosecution. Rather, it reflects that the due process inquiry focuses on the risk that a defendant will be *erroneously* deprived of his liberty. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).[8] In the civil contempt context, erroneously incarcerating a defendant who lacks the ability to comply has the same effect as if the order contained no purge clause. *See Walker* v. *McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985) ("[T]he jail is just as bleak no matter which label is used."). Accordingly, distinguishing between civil and criminal contempt for purposes of the right to counsel makes little sense when the distinction between them is maintained only if the defendant can comply with the court

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[7] Respondents claim (Br. 34 n.9) the right to counsel applies in criminal contempt only because it is a crime subject to the Sixth Amendment. Petitioners have shown that is incorrect. *See* Pet. Br. 29-30 & n.16; *Cooke*, 267 U.S. at 537; *In re Oliver*, 333 U.S. 257, 275 (1948).

[8] Citing *Medina* v. *California*, 505 U.S. 437 (1992), respondents contend (Br. 46-47) the Court should not consider the balance of interests under *Mathews*, but should instead defer to South Carolina's legislative judgment. *Medina*'s deferential standard, however, applies when evaluating the validity of state *criminal* procedures, as to which the Bill of Rights "speaks in explicit terms." 505 U.S. at 443-446. By contrast, this Court has applied *Mathews* to examine right-to-counsel questions in other civil contexts. *Lassiter*, 452 U.S. at 27. Under *Mathews* balancing, indigent civil contemnors facing incarceration are entitled to appointed counsel because of the heavy weight of their individual liberty interest—an interest recognized in *Lassiter* and other cases.

order—the very issue the defendant requires the assistance of counsel in presenting.

2. Respondents next contend that appointment of counsel is unnecessary in civil contempt proceedings because establishing the inability-to-pay defense is a straightforward factual matter for which most defendants do not require counsel. As petitioner and amici have demonstrated, however, presenting evidence and argument in support of the inability-to-pay defense are *not* straightforward undertakings, and appointed counsel would accordingly provide a significant benefit to accused contemnors. Pet. Br. 35-37, 45-48; NACDL Br. 22-26; Legal Aid Br. 14-18, 23-25; Patterson Br. 15-22.

Respondents' suggestion that a defendant is likely to establish his defense merely by putting into plain words his inability to pay, without a lawyer's help, is contrary to fundamental tenets of our adversarial system of justice. Courts are not required to credit mere assertions, and if the defendant "offers no evidence," he has not met his burden. *Maggio*, 333 U.S. at 75; *see also* Pet. Br. 35 n.20, 45-46. Indeed, respondents repeatedly fault Turner (*e.g.*, Br. 39) for having provided only "bare assertions" of indigence. Having a contempt defendant complete an "understandable form" (U.S. Br. 24) would hardly be more effective where, as the United States acknowledges (*id.* at 25), the court could simply overlook or "disbelieve[]" the defendant's recitation of his assets and income.[9] Indeed, in advance of

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[9] As amici explain, establishing an inability-to-pay defense to civil contempt is more burdensome than establishing eligibility for appointment of counsel in a criminal case. Legal Aid Br. 16-17. For example, South Carolina has adopted a "presumption" of eligibility if a defendant's "net family income is less than or equal to the [federal] Poverty Guidelines." S.C. App. Ct. R. 608(b)(4).

his hearing, Turner supplied to the family court just such a form—a copy of his application for disability benefits. Pet. Br. 11 n.27; JA 135a. If appointed, counsel would have known to call the court's attention to the application and present corroborating evidence. Instead, the court ignored it. Pet. App. 17a-18a.

Moreover, establishing an inability-to-comply defense frequently implicates questions of law, as respondents' arguments demonstrate. A judge might suspect, for example, that a defendant could not satisfy the defense of inability to pay because his indigency resulted from drug use or intentional underemployment. But whether the inability-to-comply defense may be rendered inapplicable by such conduct is a legal question beyond the capability of the lay defendant to address. *See* Pet. Br. 36 & n.21. Similarly, respondents' speculative suggestion that Turner might have earned money in jail through work release invites legal arguments about the interpretation of prison regulations, what constitutes an "inability" to comply, and what purge conditions, if any, can remediate that present inability.[10] A lay defendant likely could not spot or respond to such issues.

Nor is it sufficient for the judge to ask questions of the defendant, rather than the defendant's own lawyer. The judge is not an advocate for the defendant, and from a lay defendant's perspective, questions from the bench would be as "intricate, complex and mysterious" as questioning by opposing counsel—and likely even more intimidating. *Johnson* v. *Zerbst*, 304 U.S. 458, 463

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[10] At least one court has found the use of work release as a purge condition to be "patently unlawful." *Arrington* v. *Department of Human Res.*, 935 A.2d 432, 449 (Md. 2007).

(1938). Moreover, the proposal to burden the judge with responsibility for investigating and drawing out any available defenses hardly advances the State's interest in streamlining and reducing the cost of child-support enforcement proceedings. *Cf. McKaskle* v. *Wiggins*, 465 U.S. 168, 184 (1984); Pet. Br. 49. If appointed, counsel would relieve the court of that burden by investigating the facts, identifying relevant defenses, and framing them properly for the court's consideration.[11]

3. Finally, neither the interests of the custodial parent nor the interests of the State warrant denying the right to appointed counsel to an indigent defendant facing incarceration for civil contempt.

Respondents contend that recognizing a right to appointed counsel will unfairly disadvantage custodial parents, who may lack counsel. But at least in "IV-D" public-assistance cases subject to South Carolina's Rule 24 (*see* Pet. Br. 5-7), the custodial parent has no burden in initiating the proceeding or establishing the obligor's contempt. Those proceedings are initiated automatically by the court clerk, who can establish contempt *prima facie* by showing the defendant's failure to pay. Even outside the IV-D context, any custodial parent in South Carolina may request DSS's assistance in enforcing a support order as if it were a IV-D case. Pet. Br. 5 n.1. The defendant, in contrast, bears a heavy burden to establish the inability-to-comply defense, and—

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[11] Respondents cite a study (Br. 54-55) for the proposition that lawyers are unlikely to make a difference, but as its authors concede, the study is "useless" for determining the value of legal representation. Greiner & Pattanayak, *What Difference Representation?* 43, 47 (Feb. 12, 2011) (unpublished draft).

unlike the custodial parent—faces up to a year in jail if he cannot.

Recognizing a right to appointed counsel in civil contempt proceedings that could lead to incarceration also will not frustrate enforcement of child-support orders. As the United States acknowledges (Br. 23-24 n.8), "[t]here is no evidence" that incarceration is an effective means of securing payment from low-income noncustodial parents, who constitute a substantial proportion of child-support obligors. *See also* Pet. Br. 48-49; CFFPP Br. 16-22; Patterson Br. 6, 8-9; Legal Aid Br. 19-23; NACDL Br. 6-8. Appointing counsel to help an indigent defendant demonstrate that he cannot afford to pay, and thus cannot legally be incarcerated, does not delay payments that would otherwise be made. As to obligors who can afford to pay some portion of their arrearages, counsel can help identify the enforcement measures most likely to yield compliance, which very often will be measures other than incarceration. *See* U.S. Br. 23; Legal Aid Br. 24-25; Patterson Br. 18-21.

Nor does the State's financial interest in declining to fund appointed counsel outweigh the contempt defendant's liberty interest or his need for counsel. Pet. Br. 49-50. As the United States agrees (Br. 21), the State incurs "substantial expense" incarcerating obligors who cannot pay their arrearages. *See* Patterson Br. 22-27. And by refusing to employ more effective means of child-support enforcement in favor of maintaining its "court-based approach," South Carolina has paid more than $72 million in penalties to the federal government. U.S. Br. 6 & n.4. In contrast, numerous States have long and successfully provided for appointment of counsel in civil contempt proceedings that may result in incarceration, including many of

respondents' State amici, who tellingly cite no evidence of resulting financial harm. *See* Texas Br. 1, 11-12, 15-16. Respondents and amici Senators likewise cite no evidence of a significant burden on state fisces except the assertion of one unidentified New Jersey official that the State no longer pursues incarceration in cases involving indigent child-support obligors to avoid having to appoint counsel. Resp. Br. 61; Senators Br. 25. Even if true, all this would show is that New Jersey sensibly assesses an obligor's indigence before any contempt hearing, instead of seeking to incarcerate an indigent who cannot legally be incarcerated for civil contempt. Senators Br. 8a.[12]

C. A Case-By-Case Approach To The Right To Counsel Would Not Satisfy Due Process

Citing *Gagnon*, respondents and the United States contend that any due process right to appointed counsel in civil contempt proceedings should apply only in cases of exceptional complexity. Resp. Br. 62-63; U.S. Br. 26-29. As explained, however (*supra* pp. 10-11), the Court in *Gagnon* declined to find a categorical right to appointed counsel in probation revocation hearings only because of the informal nature of the proceeding and

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[12] The Government cites (Br. 29-31) the federal political branches' decision not to reimburse States for the cost of appointing counsel in child-support enforcement proceedings. But that federal policy judgment does not determine the degree of process that is due in state contempt proceedings under the Due Process Clause. And if it did, the "balance" struck by the federal government would foreclose both appointment of counsel *and* incarceration of indigent contemnors. *See* U.S. Br. 30-31; 45 C.F.R. §304.23(i) (no federal funding for "[a]ny expenditure for jailing of parents in child-support enforcement cases").

the diminished nature of the liberty interests at stake, and because revocation usually resulted from a criminal conviction—an event the parole board could note without need of additional facts or legal argument. 411 U.S. at 787.

This Court has not applied *Gagnon*'s case-by-case approach outside the probation revocation context when incarceration has been at stake.[13] Nor have the lower courts extended *Gagnon* beyond probation revocation or analogous proceedings. *See, e.g.*, *United States* v. *Eskridge*, 445 F.3d 930, 932 (7th Cir. 2006) (revocation of supervised release); *Drayton* v. *McCall*, 584 F.2d 1208, 1220 (2d Cir. 1978) (rescission of parole); *Pope* v. *Chew*, 521 F.2d 400, 405 (4th Cir. 1975) (revocation of conditional pardon). Outside that limited context, this Court has consistently held that the due process right to counsel in cases involving a defendant's incarceration is categorical. *Supra* Part II.A. Here, none of the considerations that supported a case-by-case approach in *Gagnon* applies in the civil contempt context. Establishing the inability-to-comply defense is not the simple, straightforward undertaking respondents

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[13] Respondents cite (Br. 48-49) other decisions as rejecting a "categorical" right to counsel, but none (other than *Gagnon*) involved commitment to state confinement. *See Lassiter*, 452 U.S. 18 (termination of parental rights); *Mathews*, 424 U.S. 319 (termination of disability benefits); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (entitlement to benefits); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (school suspension); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (loss of good-time credits); *cf. Parham*, 442 U.S. 584 (deciding no right-to-counsel issue). The United States (Br. 26) cites *Middendorf*, but the Court expressly declined to extend *Gagnon* in that case, holding instead—for reasons that do not apply here, *see supra* p. 10—that no right to counsel applied in summary courts-martial. 425 U.S. at 42-43.

depict. Defendants face a heavy burden to meet it—and face jail if they fail—in *all* cases. *Supra* pp. 14-16; Pet. Br. 50 n.24.

Though it agrees that Turner's incarceration violated his due process rights, the United States contends (Br. 23-25) that a case-by-case approach to appointment of counsel would adequately protect those rights if the State adopted other procedures to ensure an accurate determination of the contempt defendant's ability to pay. As discussed, however, the proposed alternatives do not suffice given the nature of the showing the defendant must make. *Supra* pp. 14-16. They are also unworkable. For example, the suggestion (U.S. Br. 25) that due process might be satisfied if the family court "question[ed] the contemnor about his finances" begs the question how thoroughly the court must inquire and how carefully the court must consider the defendant's responses. Similarly, the United States offers no way to determine whether due process would be satisfied if a defendant completed an "understandable form" (Br. 24), but the family court did not state on the record whether it had reviewed or considered the information provided. The Government's proposals, like a limited case-by-case right to counsel, are thus constitutionally insufficient to reduce the risk that a contempt defendant who cannot comply with the court order will nonetheless be erroneously incarcerated.

D. Respondents' Slippery-Slope Arguments Fail

Respondents erroneously predict (Br. 40-41) that petitioner's position will require application of other criminal procedural protections to civil contempt cases. This claim stems from respondents' mistaken view that applying the right to appointed counsel here would require "[e]xtending the Sixth Amendment" to civil

contempt proceedings. Resp. Br. 40. As explained, *supra* p. 12, petitioner's argument does not depend on characterizing civil contempt proceedings as "criminal prosecutions." Accordingly, other Sixth Amendment protections would not apply unless the Court separately determined that fundamental fairness required it. Thus, the Court's determination in *Gault* that the Due Process Clause required appointment of counsel in juvenile delinquency hearings, 387 U.S. at 14, 41, did not prevent the Court from subsequently holding the right to a jury trial inapplicable. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 541, 543-551 (1971) (plurality); *see also id.* at 553-555 (Brennan, J., concurring in part and dissenting in part); Pet. Br. 30 n.17. In the civil contempt context, it is settled that the jury trial right and the reasonable doubt standard do not apply. *International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 827 (1994). But the right to counsel is, as this Court has long recognized, a unique procedural right. And here, it would play an especially significant role in helping indigent contempt defendants establish inability to comply and maintaining the civil character of the proceeding. Pet. Br. 41 n.23.

Joined by the United States, respondents also claim petitioner's position, if adopted, would require appointment of counsel in other civil proceedings threatening a loss of liberty, such as immigration, customs detention, post-conviction collateral attacks, or extradition. Resp. Br. 40; U.S. Br. 31-32. None of those proceedings is before the Court, however, and very different considerations would apply in each case.

In the immigration context, the weight of the government's interest and the nature and purpose of removal proceedings might well distinguish them from other civil proceedings in which the Court has

recognized a right to appointed counsel, as was true in the context of summary courts-martial in *Middendorf*. *See Demore* v. *Kim*, 538 U.S. 510, 521-522 (2003). Indeed, the United States argues as much (Br. 31-32). Similarly, considerations of comity and the extremely limited nature and purpose of a judicial proceeding to determine whether an individual is extraditable might distinguish extradition proceedings from other civil proceedings involving a loss of liberty. *See, e.g., Ordinola* v. *Hackman*, 478 F.3d 588, 607-609 (4th Cir. 2007) (Traxler, J., concurring) (discussing 18 U.S.C. §3184).

Respondents' other examples (Br. 40) fare no better. Customs detention is a law-enforcement function, carried out by border patrol agents, that involves no judicial proceeding at all. *See, e.g., United States* v. *Montoya de Hernandez*, 473 U.S. 531, 539 (1985). A customs detainee's procedural rights are governed by the Fourth and Fifth Amendments, *see id.* at 537-540, including any right to counsel before custodial interrogation, *see, e.g., United States* v. *Moya*, 74 F.3d 1117, 1119 (11th Cir. 1996).

As to habeas, this Court has already determined that a convicted defendant has no federal right to counsel when collaterally attacking his conviction. *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987). But this is because, unlike in a civil contempt proceeding, the assistance of counsel in a post-conviction collateral attack serves "'not as a shield to protect [the defendant] against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.'" *Id.* (quoting *Ross* v. *Moffitt*, 417 U.S. 600, 610-611 (1974)). Moreover, whereas a civil contempt defendant may lose the most fundamental of liberty interests, a petitioner bringing a collateral attack is incarcerated—and his

liberty interests diminished—because of his underlying criminal conviction, not the habeas proceeding. *See District Attorney's Office* v. *Osborne*, 129 S. Ct. 2308, 2320 (2009); *Shelton*, 535 U.S. at 665. Nothing in petitioner's position would require appointment of counsel in such circumstances.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 10-10

In the Supreme Court of the United States

MICHAEL D. TURNER, PETITIONER

v.

REBECCA L. ROGERS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to review the decision of the South Carolina Supreme Court.

2. Whether due process requires that the State provide counsel, at its expense, to an indigent parent in a child-support proceeding, when the parent is subject to a civil-contempt order for non-payment that may lead to confinement.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 10
Argument:
I. The Court has jurisdiction to review the decision of the South Carolina Supreme Court 13
II. The absence of adequate procedures necessary to secure an accurate adjudication of civil contempt violated due process 16
A. Confinement for civil contempt is permitted only when the contemnor is presently able to comply with the underlying order 16
B. The Family Court's procedures were inadequate to ensure an accurate determination of present ability to pay 19
C. Due Process can be satisfied by a variety of procedures intended to assure an accurate determination of present ability to pay in a civil contempt proceeding 23
1. Courts can comply with Due Process by providing a meaningful opportunity for an alleged contemnor to establish his present ability to pay 24
2. There is no basis for an inflexible right to counsel rule in civil contempt proceedings ... 25
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Alvarez v. *Smith*, 130 S. Ct. 576 (2009) 15
Blessing v. *Freestone*, 520 U.S. 329 (1997) 3
Cafeteria & Rest. Workers v. *McElroy*, 367 U.S. 886 (1961) 25
Carlson v. *Landon*, 342 U.S. 524 (1952) 32
City of L.A. v. *Lyons*, 461 U.S. 95 (1983) 14, 15
DeFunis v. *Odegaard*, 416 U.S. 312 (1975) 14
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 14
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 20
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 12, 25, 26, 27, 28, 29
Gault, In re, 387 U.S. 1 (1967) 26
Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 16, 17
Hicks v. *Feiock*, 485 U.S. 624 (1988) 17, 18
Hodges v. *Shalala*, 121 F. Supp. 2d 854 (D.S.C. 2000), aff'd, 311 F.3d 316 (4th Cir. 2002), cert. denied, 540 U.S. 811 (2003) 5, 6
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 32
International Union, United Mine Workers v. *Bagwell*, 512 U.S. 821 (1994) 18, 19, 26
Landon v. *Plasencia*, 459 U.S. 21 (1982) 31
Lassiter v. *Department of Soc. Servs.*, 452 U.S. 18 (1981) 28, 29
Lujan v. *G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001) 25
Maggio v. *Zeitz*, 333 U.S. 56 (1948) 17, 18
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 11, 19, 20, 25, 26, 29

Cases—Continued: Page

Middendorf v. *Henry*, 425 U.S. 25 (1976) 12, 26, 29, 31
Mohammed v. *Gonzales*, 400 F.3d 785 (9th Cir. 2005) ... 32
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 19, 26
Moseley v. *Mosier*, 306 S.E.2d 624 (S.C. 1983) 17
Murphy v. *Hunt*, 455 U.S. 478 (1982) 13, 14
Nazakat v. *INS*, 981 F.2d 1146 (10th Cir. 1992) 33
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 15
Shillitani v. *United States*, 384 U.S. 364 (1966) 11, 17
Spencer v. *Kemna*, 523 U.S. 1 (1998) 13, 14
United States v. *Bauer*, 956 F.2d 693 (7th Cir.), cert. denied, 506 U.S. 882 (1992) 28
United States v. *Campos-Asencio*, 822 F.2d 506 (5th Cir. 1987) 33
United States v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975) 32
United States v. *Rylander*, 460 U.S. 752 (1983) 18
United States v. *Torres-Sanchez*, 68 F.3d 227 (8th Cir. 1995) 33
United States Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) 13
Vitek v. *Jones*, 445 U.S. 480 (1980) 26, 27
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 29, 30, 31
Weinstein v. *Bradford*, 423 U.S. 147 (1975) 14
Wilkinson v. *Austin*, 545 U.S. 209 (2005) 19
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 24

Constitution, statutes and regulations: Page

U.S. Const.:
Amend. V (Due Process Clause) 9, 19
Amend. VI 9, 26, 27
Amend. XIV (Due Process Clause) 19
Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2351 (42 U.S.C. 651 *et seq.*) 1, 3
§ 101(e)(5)(C), 88 Stat. 2380 3
42 U.S.C. 654(4) 3
42 U.S.C. 654(6) (1976) 3
42 U.S.C. 654(8) 3
42 U.S.C. 654(16) 4
42 U.S.C. 654(24) 5
42 U.S.C. 654a(a) 6
42 U.S.C. 654a(e)(1) 6
42 U.S.C. 654a(e)(4) 6
42 U.S.C. 654a(e)(5) 6
42 U.S.C. 654a(g)(1) 6
42 U.S.C. 655(a)(2) 4
42 U.S.C. 655(a)(2)(C) 2
42 U.S.C. 655(a)(3)(A) 4
42 U.S.C. 655(a)(4) 6
42 U.S.C. 656(a)(1) (1976) 3
42 U.S.C. 657(a)(4)(B) (1976) 3
42 U.S.C. 657(b) (1976) 3
42 U.S.C. 666(a)(1)-(8) 4

Statutes and regulations—Continued: Page

42 U.S.C. 666(a)(8)(A) 30
42 U.S.C. 666(a)(7)(B)(i) 30
42 U.S.C. 666(a)(8)(A)(i) 30
42 U.S.C. 666(b) 4
42 U.S.C. 666(c) 6
42 U.S.C. 666(c)(1)(H) 30
Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1329:
§ 6, 98 Stat. 1314 4
§ 23(a)(2), 98 Stat. 1329 4
§ 23(a)(3), 98 Stat. 1329 4
Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 4
§ 123(a)(C), 102 Stat. 2352 5
Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 5
§ 344(a)(2), 110 Stat. 2235 6
Social Security Act Amendments of 1950, ch. 809, § 321(b), 64 Stat. 550 2
Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a)(1), 81 Stat. 877-879 2
§ 201(a)(1), 81 Stat. 879 3
8 U.S.C. 1229a(b)(4)(A) 32
8 U.S.C. 1382 31
18 U.S.C. 3006A(b) 28
28 U.S.C. 1257(a) 18
42 U.S.C. 602(a)(26) (1976) 3

Statutes and regulations—Continued: Page

42 U.S.C. 608(a)(3)(A) 5, 7
42 U.S.C. 608(a)(7) 5
45 C.F.R.:
Section 302.70(a)(5)(iii) 30
Section 303.5(g)(2)(iii) 30
Section 303.6 (1975) 4
Section 303.6 (1989) 5
Section 303.20(e)(7) (1975) 4
Section 303.20(e)(7) (1989) 5
Section 303.100(a)(6) 30
Section 303.100(f)(4) 30
Section 303.101(c)(2) 30
Section 303.102(c)(1) 30
Section 303.104(b) 30
Section 304.20(b)(8)(iv) 5
Section 304.23(i) 30
Section 304.23(j) 30
Sup. Ct. R. 14.1(a) 24
S.C. Rule of Family Ct.:
R. 24 7
R. 24(a) 7
R. 24(b) 7
S.C. Code Ann. (West):
§ 43-5-220(e) (Supp. 2009) 25
§ 43-5-235 (Supp. 2009) 7
§ 63-3-620 (2010) 7, 14

Miscellaneous: Page

52 Fed. Reg. 32,130 (1987) 31

U.S. Dep't of Health & Human Servs.:

National Child Support Enforcement, *Strategic Plan, FY 2005-2009*, http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf 21, 22, 28

Office of Child Support Enforcement, *National Status of Automated Child Support Systems*, http://www.acf.hhs.gov/programs/cse/stsys/certmap.htm 6

Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95 (2008) 21, 22

S. Rep. No. 387, 98th Cong., 2d Sess. (1984) 30

Elaine Sorensen et al., *Assessing Child Support Arrears in Nine Large States & the Nation* (2007) http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf 22, 28

South Carolina Dep't of Social Servs., *Response to Budget Proviso 18.27* (Aug. 31, 2007) http://www.scstatehouse.gov/reports/DSS_Provisonresponse18.27_083107.doc 6

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case concerns the due process protections that apply in a state civil contempt proceeding for nonpayment of court-ordered child support. The state child-support enforcement program at issue in the case, like that in every other State, is part of one of the largest cooperative federal-state programs, established under the Social Services Amendments of 1974 (1975 Act), Pub. L. No. 93-647, § 101(a), 88 Stat. 2351 (42 U.S.C. 651 *et seq.*) (adding Title IV-D to the Social Security Act). The program, which is administered by the Secretary of Health and Human Services (Secretary), provides that States with approved plans for child and spousal support that meet federal requirements are reimbursed by the federal government for 66% of the costs of operating their child-support enforcement programs. 42 U.S.C.

666(a)(2)(C). The United States has a substantial interest in the effective and equitable operation of such child-support programs.

STATEMENT

1. This case involves proceedings in South Carolina family court to enforce a child-support order entered against petitioner for the support of his and respondent Rogers' minor child. South Carolina, like every other State, maintains a child-support enforcement program as a condition of receiving federal funding for its Temporary Assistance for Needy Families program. Since Congress first required States receiving federal funds to undertake child-support enforcement efforts, it has shifted its emphasis from a localized, court-based enforcement approach to centralized and automated efforts. South Carolina, however, maintains a localized, court-based approach to child-support enforcement.

a. Congress first required States receiving federal funds to establish child-support enforcement programs in 1950, pursuant to the Aid to Families with Dependent Children (AFDC) program. See Social Security Act Amendments of 1950, ch. 809, § 321(b), 64 Stat. 550 (requiring States receiving AFDC funds to "provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to dependent children in respect of a child who has been deserted or abandoned by a parent"). In 1968, Congress required States participating in AFDC to create statewide or local "organizational unit[s]" for establishing paternity and collecting child support. Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a)(1), 81 Stat. 877-879. It also required States to "provide for entering into cooperative arrangements with appropriate courts and law enforce-

ment officials * * * to assist" with administration of the program. *Id.* § 201(a)(1), 81 Stat. 879.

b. In 1975, Congress adopted Title IV-D, 42 U.S.C. 651 *et seq.*, and established the general statutory framework that exists today. See 1975 Act § 101(a), 88 Stat. 2351; *Blessing* v. *Freestone*, 520 U.S. 329, 333-335 (1997) (describing program). The 1975 Act required States participating in AFDC to "have in effect a plan approved" by the Secretary under Title IV-D and to "operate a child support program in conformity with such plan." 1975 Act § 101(c)(5)(C), 88 Stat. 2360. In particular, each State was required to provide services to locate noncustodial parents and to establish the paternity of, and secure support for, children receiving AFDC benefits. 42 U.S.C. 654(4).

Under the 1975 Act, AFDC recipients were required to assign their support rights to the State and cooperate in enforcement efforts. 42 U.S.C. 602(a)(26) (1976). Amounts recovered generally were retained by the State to reimburse it and the federal government for AFDC assistance provided to the child's family. 42 U.S.C. 657(b) (1976). Once assigned, the support obligation was owed to the State and was collectible under all applicable state processes. 42 U.S.C. 656(a)(1) (1976).[1]

The Secretary's regulations implementing the 1975 Act reflected a localized, court-centered approach to enforcement. States' efforts to collect past-due child support were required to include ("as applicable and necessary"): "[c]ontempt proceedings to enforce an extant court order," court-ordered wage garnishment, and

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[1] Congress required States to provide services to non-AFDC families as well, 42 U.S.C. 654(6) (1976), although those families were not required to assign their support rights and any child support the State collected was paid to the family. 42 U.S.C. 657(a)(4)(B) (1976).

attachment of real and personal property. 45 C.F.R. 303.6 (1975). States were also required to maintain sufficient staff (either statewide or locally) to "enforce collection of support" by "executing contempt proceedings, wage assignments, obtaining garnishment orders, attaching real and personal property, criminal prosecution and executing judgments." 45 C.F.R. 303.20(c)(7) (1975).

c. In 1984, Congress found that there remained "a critical lack of child support enforcement," which had "a critical impact on the health and welfare of the children of the Nation." Child Support Enforcement Amendments of 1984 (1984 Amendments), Pub. L. No. 98-378, § 23(a)(2) and (5), 98 Stat. 1329. The 1984 Amendments required States to adopt laws and procedures providing for, among other things, (i) mandatory wage withholding; (ii) expedited processes for obtaining and enforcing support orders; (iii) state income tax refund intercepts; and (iv) reporting overdue support to consumer credit agencies. 42 U.S.C. 666(a)(1)-(8) and (b).

Congress ultimately set the federal share of reimbursable expenditures at 66%, 42 U.S.C. 655(a)(2), but expanded the availability of matching funds at the 90% level for (optional) State expenditures for automating data processing systems to improve "the monitoring of support payments, the maintenance of accurate records regarding the payment of support, and the prompt provision of notice to appropriate officials with respect to any arrearages in support payments which may occur." 1984 Amendments § 6, 98 Stat. 1314; 42 U.S.C. 654(16); 655(a)(3)(A).

d. Congress amended Title IV-D again in 1988 to improve the rate of child-support collection. Family Support Act of 1988 (1988 Act), Pub. L. No. 100-485,

102 Stat. 2343. Because effective child-support enforcement "had long been thwarted by localized enforcement systems that were unable to quickly and effectively track delinquent parents who crossed county and state lines," *Hodges* v. *Shalala*, 121 F. Supp. 2d 854, 874 (D.S.C. 2000), aff'd, 311 F.3d 316 (4th Cir. 2002), cert. denied, 540 U.S. 811 (2003), Congress in the 1988 Act emphasized centralized, automated record-keeping and information retrieval in order to improve collection rates. In particular, Congress mandated "automated data processing and information retrieval system[s]" that had previously been optional. 1988 Act § 123(a)(C), 102 Stat. 2352; 42 U.S.C. 654(24).

The Title IV-D regulations were amended after adoption of the 1988 Act. As amended, the regulations omitted specific references to contempt proceedings as required means for enforcing child-support obligations. See 45 C.F.R. 303.6, 303.20(c)(7) (1989);[2] cf. pp. 3-4, *supra*.

e. Finally, Congress made further changes to the child-support enforcement system in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (1996 Act), Pub. L. No. 104-193, 110 Stat. 2105, which, among other things, replaced AFDC with the block-grant program called Temporary Assistance for Needy Families (TANF).[3] Those changes again emphasized a centralized, automated approach to child-support

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[2] Federal financial support remained available for "[e]nforcement of a support obligation" through a variety of means, including contempt citations. 45 C.F.R. 304.20(b)(3)(iv).

[3] The 1996 Act also imposed a five-year cap on benefits. 42 U.S.C. 608(a)(7). As before, a custodial parent is required to assign her rights to child support to the State as part of the application for TANF assistance. 42 U.S.C. 608(a)(3)(A).

enforcement. The amended statute established detailed requirements for the "statewide automated data processing and information retrieval systems" made mandatory in 1988. *Id.* § 344(a)(2), 110 Stat. 2235, 42 U.S.C. 654a(a). Among other things, the system must include a state case registry that includes every child-support case in the State, including the amount of monthly support owed and collected in all cases administered by the state agency. 42 U.S.C. 654a(e)(1) and (4); see 42 U.S.C. 654a(e)(5) (States must "promptly * * * update" case records when circumstances change). The States are required to use their centralized databases "to the maximum extent feasible, to assist and facilitate the collection and disbursement of support payments," including by establishing wage-withholding orders and sending wage-withholding notices to employers. 42 U.S.C. 654a(g)(1); see 42 U.S.C. 666(c).

f. Despite the changes in federal law, South Carolina maintains a localized, court-based approach to child-support enforcement. It is the only State that does not have a certified automated system. See Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., *National Status of Automated Child Support Systems*, http://www.acf.hhs.gov/programs/cse/stsys/certmap.htm.[4]

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[4] In the 1996 Act, Congress determined that any State that failed to automate its child-support program should incur substantial penalties. 42 U.S.C. 655(a)(4). In 2000, South Carolina unsuccessfully challenged the Department of Health and Human Services' (HHS) authority to impose a penalty for its non-compliance, see *Hodges* v. *Shalala*, *supra*, and subsequently submitted a corrective-action plan and accepted imposition of a penalty retroactive to 1998. The State paid more than $56 million in penalties through 2007. South Carolina Dep't of Social Servs., *Response to Budget Proviso 18.27* at 4 (Aug. 31, 2007), http://www.scstatehouse.gov/reports/DSS/Provisoresponse1827

Acting pursuant to express statutory authority, S.C. Code Ann. § 43-5-235 (West Supp. 2009), the State's Department of Social Services has contracted with county clerks of court across the State to administer its program. The South Carolina courts have in turn adopted a special rule governing child-support enforcement. See S.C. Rule of Family Ct. 24 (S.C. Rule 24). The rule requires clerks of court to review on a monthly basis "all child support and periodic alimony accounts paid through the clerk of court," as are all accounts for children whose custodial parent receives TANF assistance. S.C. Rule 24(a); see 42 U.S.C. 608(a)(3)(A). When any such account is in arrears, the clerk is required to "issue a rule to show cause and an affidavit identifying the order of the court which requires such payments to be made and the amount of the arrearage [and] directing the party in arrears to appear in court at a specific time and date" to face contempt proceedings. S.C. Rule 24(b).

A "wilful[]" violation of a "lawful order" of a South Carolina court constitutes contempt and may subject the contemnor to up to 12 months confinement. S.C. Code Ann. § 63-3-620 (West 2010).

2. Respondent Rogers and petitioner are the parents of a minor child, B.L.P. In 2003, the family court in Oconee County, South Carolina, entered an Order of Financial Responsibility against petitioner. Although the order noted that petitioner was unemployed, the court imputed a gross monthly income of $1386 to him and ordered him to pay $59.72 a week in child support through the court. Pet. App. 22a; see *id.* at 19a-24a, 25a.

083107.doc. We are informed by HHS that the State has now paid a total of more than $72 million in penalties to date and currently owes an additional incurred penalty of more than $10 million for fiscal year 2010.

Because respondent Rogers was receiving public assistance, she assigned her right to collect child support to the Department of Social Services. Pet. Br. 8; see *id.* at 9 n.6 (payments were remitted to respondent Rogers starting in 2004 because her benefits had ended but her case continued to be administered as a Title IV-D case). Petitioner fell behind on his payments, received a number of rules to show cause from the court clerk why he should not be held in contempt, and was jailed three times as a result. *Id.* at 9-10.

By 2007, petitioner was $5728.76 behind on his child-support payments, and a judge of the Oconee County Family Court issued a bench warrant for his arrest. Pet. App. 6a; Pet. Br. 8-9. A hearing was held on January 3, 2008. After noting petitioner's outstanding balance and stating that he had not made a payment since August 2006, the judge asked petitioner, "[i]s there anything you want to say?" *Id.* at 17a. Petitioner responded:

> Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me.

Ibid.

After a brief exchange between petitioner and respondent about his SSI application, the court said:

> If there's nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I'm gonna sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release.

Pet. App. 18a. The court made no finding that petitioner was capable of paying the arrears while incarcerated. See *id.* at 17a-18a.

At this hearing, neither petitioner nor respondent Rogers was represented by counsel. Pet. App. 6a. However, pro bono counsel filed an appeal on petitioner's behalf, alleging that petitioner had a right under the Sixth Amendment and the Due Process Clause to have appointed counsel in the contempt proceeding. *Id.* at 10a-15a. Before the intermediate state court could rule, the South Carolina Supreme Court granted discretionary review and affirmed the family court. *Id.* at 1a-5a.

The court noted that the "purpose of civil contempt is to coerce the defendant to comply with the court's order," while criminal contempt's purpose is "to punish a party for disobedience or disrespect." Pet. App. 2a-3a. "Civil contempt sanctions are conditioned on compliance with the court's order. * * * A contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time." *Id.* at 3a. The court recognized that the "distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards not mandated in civil contempt proceedings." *Ibid.*

The court noted that in this case the family court had said that petitioner could "purge himself of the contempt" by achieving a "zero balance" on his arrearage. Pet. App. 3a. Reasoning that "[t]his conditional sentence is a classic civil contempt sanction," the court concluded that petitioner had no right to appointed counsel. *Ibid.*

SUMMARY OF ARGUMENT

1. The Court has jurisdiction to review the decision of the South Carolina Supreme Court. Petitioner has completed his term of confinement for civil contempt and has not identified any collateral consequences flowing from the contempt. Those facts would ordinarily render his case moot. Petitioner, however, qualifies for a narrow exception to the mootness doctrine because the controversy is capable of repetition yet evading review. Sentences for civil contempt in South Carolina are limited to 12 months, and it is highly unlikely that petitioner would be able to secure plenary review by this Court within any future period of confinement. In addition, the constitutional violation petitioner asserts is capable of repetition because he remains subject to the underlying child-support order and still has substantial arrears. There is thus a reasonable expectation that he will receive automatically-generated rules to show cause for contempt in the future. Indeed, since the contempt at issue in this case, petitioner has been jailed again for civil contempt.

2. Petitioner's confinement for civil contempt violated due process, not because he lacked counsel, but because the procedures employed by the family court were inadequate to ensure the accurate determination of petitioner's present ability to pay his child-support ar-

rears. That ability to pay was a necessary predicate to the civil contempt sanction.

The defining feature of confinement for civil contempt is its purpose to coerce compliance with a court order. Such confinement must therefore end upon discharge of the contemnor's obligations; he is said to hold "the keys of [his] prison in [his] own pocket[]." *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966) (citation omitted). Such confinement may not be imposed, however, where the contemnor demonstrates his inability to comply with the order. In such cases, he does not truly hold the keys to the prison; to confine him nonetheless would render the confinement punitive and thus a sanction that may be imposed only after compliance with criminal case safeguards.

The question of petitioner's ability to pay his child-support arrears therefore should have been a focus of the civil contempt proceeding, but it was not. Pro se petitioner was afforded no meaningful opportunity to establish his indigency, and even after he made a statement that could have easily been understood to mean he had no present ability to pay nearly $8000 to avoid jail, the family court judge made no further inquiry on the matter before committing him to a nominally conditional term of confinement.

The proceeding did not comply with due process because there was a serious risk of erroneous deprivation of petitioner's liberty through the procedures employed and because additional procedures would have enhanced the accuracy of the proceeding without materially impinging on any governmental interest. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Provision of counsel would have been a sufficient, but not a necessary, means of satisfying due process in this case. There were other

means of providing petitioner with a meaningful opportunity to establish his present inability to pay, such as asking him to complete an understandable form seeking his financial information, or asking him questions on the topic as necessary at a hearing. In the typical case, providing basic information about one's personal finances is not the kind of undertaking that requires assistance of counsel, and due process protections are based on the requirements of the mine-run case, not the exceptional one.

There is no basis for petitioner's proposed categorical due process right to appointed counsel in civil contempt proceedings where confinement is imposed. The Court has declined to recognize a categorical constitutional right to appointed counsel in the context of other non-criminal proceedings that can result in confinement. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782-790 (1973) (probation revocation); *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) (summary court-martial). Civil contempt proceedings in child-support cases are relatively brief; the custodial parent may not be represented by counsel; and the issues in dispute are generally not complex. Given those circumstances, there is no warrant for recognizing a categorical right to defense counsel in such proceedings. Finally, recognizing a due process right to counsel in such proceedings would upset the balance struck by Title IV-D and its implementing regulations, both of which stress the importance of due process protections in child-support proceedings but neither of which permit federal funding for provision of counsel.

ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE SOUTH CAROLINA SUPREME COURT

Although petitioner has completed his term of confinement for the civil contempt at issue here, his claim is not moot because he remains subject to the underlying child-support order and because there is a reasonable expectation that he will face future contempt proceedings. His claim thus avoids mootness because it is capable of repetition yet evading review. This Court thus has jurisdiction to review the final judgment of the South Carolina Supreme Court. See 28 U.S.C. 1257(a).

1. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (internal quotation marks omitted) (quoting *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980)). While a currently confined individual's challenge to his confinement generally presents no question of mootness, an individual who has been released from confinement ordinarily may continue to press his challenge only if he suffers some "collateral consequence" that constitutes a "concrete and continuing injury." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Because this Court "ha[s] been willing to presume that a wrongful conviction has continuing collateral consequences," the Court ordinarily will not dismiss as moot a criminal defendant's challenge to his conviction once the defendant has completed his term of imprisonment. *Id.* at 8. But the Court has not employed that presumption in other contexts, instead requiring a party not in custody to demonstrate that he will actually face collateral consequences if he does not secure relief

on appeal. *See id.* at 14 (no presumption of collateral consequences for parole revocation); *see also id.* at 14-16 (reviewing party's claimed collateral consequences).

Petitioner has completed his term of confinement for civil contempt. Because he challenges a civil order, not a criminal conviction, no presumption of collateral consequences applies. Moreover, petitioner has not identified any collateral consequences flowing from the finding of civil contempt. Ordinarily, petitioner's challenge to that finding would be considered moot and beyond this Court's jurisdiction.

2. Petitioner's claim in this case, however, avoids mootness because his is one of the "exceptional situations" in which a claim is capable of repetition, yet evading review. *City of L.A.* v. *Lyons*, 461 U.S. 95, 109 (1983). In non-class actions, this doctrine requires satisfaction of two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy*, 455 U.S. at 482 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Petitioner satisfies both elements.

First, confinement for civil contempt in South Carolina is limited to 12 months. S.C. Code Ann. § 63-3-620 (West 2010), and it is exceedingly unlikely that a contemnor could appeal through the South Carolina court system, petition this Court for a writ of certiorari, and receive a decision on his claim within such a limited time period. *See, e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978) (18 months was "too short a period of time for appellants to obtain complete judicial review"); *cf. DeFunis* v. *Odegaard*, 416 U.S. 312, 319 (1973) (per curiam) (future challenge to law school

admission procedure could likely come to this Court for decision within three-year period of law school matriculation). Indeed, in this case, petitioner had completed his term of imprisonment for civil contempt more than a year before the South Carolina Supreme Court rendered its decision. Compare Pet. App. 8a with *id.* at 1a.

Second, petitioner "can make a reasonable showing that he will again be subjected to the alleged illegality." *Lyons*, 461 U.S. at 109. Petitioner is still subject to the underlying order for child support, and he is nearly $14,000 in arrears. Pet. Br. 15; J.A. 104a. Given that clerks of court in South Carolina automatically issue rules to show cause when a non-custodial parent is late on a required payment, there is a reasonable expectation that petitioner will again be subject to contempt proceedings. Indeed, after he was released from jail for the contempt at issue here, petitioner was again held in contempt and reincarcerated. In May 2010 yet another rule to show cause for contempt issued due to failure to pay support to respondent. Pet. Br. 13-15; see *id.* at 15 (May 2010 rule to show cause is still outstanding); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 594 n.6 (1999) (suit by plaintiffs seeking community-based services rather than institutionalization not moot even though they were then receiving desired services, because of "the multiple institutional placements [they] ha[d] experienced"). This is thus far from "an abstract dispute about the law" that might be thought "unlikely to affect [petitioner] any more than it affects other [South Carolina] citizens." *Alvarez* v. *Smith*, 130 S. Ct. 576, 580 (2009).[5]

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[5] That petitioner was represented by pro bono counsel in a subsequent contempt proceeding involving a different support order, see Pet. Br. 15 n.10, does not mean his claim is incapable of repetition. Were pro bono counsel bound to represent petitioner in every future contempt

II. THE ABSENCE OF ADEQUATE PROCEDURES NECESSARY TO SECURE AN ACCURATE ADJUDICATION OF CIVIL CONTEMPT VIOLATED DUE PROCESS

The validity of the civil contempt order against petitioner turned on a critical fact: his present ability to purge himself of contempt by paying off his past-due child support. The family court's procedures in this case violated due process because they were inadequate to ensure an accurate determination of that fact and thus prevent an erroneous deprivation of petitioner's liberty. Although provision of government-provided counsel would have been a sufficient means of complying with due process requirements in this case, it was not a necessary one. Other mechanisms, such as requiring an affidavit for disclosure of financial information and a preliminary assessment of petitioner's current ability to pay child support, would have satisfied the requirements of due process.

A. Confinement For Civil Contempt Is Permitted Only When The Contemnor Is Presently Able To Comply With The Underlying Order

Both civil and criminal contempt can lead to confinement, but this Court has long distinguished the two based on the "character and purpose" of the sanction imposed. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). In civil contempt, the "punishment * * * [is] remedial," in that it is intended to "coerc[e]

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proceeding, then his claim of entitlement to the assistance of counsel would be moot. There is no indication in the record, however, that pro bono counsel is under any such obligation, and, in fact, counsel did not appear in a 2008 contempt proceeding involving support owed respondent, see id. at 13-14 (noting that petitioner appeared pro se in 2008 and served six months for civil contempt).

the defendant to do what he had refused to do." *Id.* at 442. Punishment for criminal contempt, on the other hand, is "punitive" and is imposed "to vindicate the authority of the court." *Id.* at 441.

Because of that fundamental distinction, confinement imposed for civil contempt is conditional. The sentence must include a purge clause under which the contemnor will be immediately released upon compliance with the underlying court order. *Hicks* v. *Feiock*, 485 U.S. 624, 634 (1988). When confined under such a civil contempt order, the contemnor holds "the keys of [his] prison in [his] own pocket[]." *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966) (citation omitted); see *id.* at 370 ("While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness" to comply with a court order.).

A purge clause by itself, however, will not render the contemnor's confinement remedial rather than punitive because "the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order." *Shillitani*, 384 U.S. at 370-371. Accordingly, "punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks*, 485 U.S. at 638 n.9; see *Maggio* v. *Zeitz*, 333 U.S. 56, 72 (1948) ("[T]o jail one for a contempt for omitting an act he is powerless to perform would * * * make the proceeding purely punitive, to describe it charitably."); see also *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983)

("When the parent is *unable* to make the required payments, he is not in contempt.").[6]

The burdens of production and persuasion may be placed on the defendant to demonstrate his present inability to comply with an order. *See Hicks*, 485 U.S. at 637; *United States* v. *Rylander*, 460 U.S. 752, 757 (1983). Accordingly, if the defendant "offers no evidence as to his inability to comply," "stands mute," or is disbelieved by the court, then he fails to carry his burden and may be held in contempt. *Maggio*, 333 U.S. at 75. But the trial court "is obliged" to consider "all the evidence properly before it in the contempt proceeding in determining whether or not there is actually a present ability to comply and whether failure so to do constitutes deliberate defiance which a jail term will break." *Id.* at 76.

If, upon examination, a contempt penalty is considered punitive rather than remedial, it will be vacated unless all "the protections that the Constitution requires of * * * criminal proceedings" were provided. *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 826 (1994) (quoting *Hicks*, 485 U.S. at 632).

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[6] A defendant may not avoid a finding of civil contempt for violating an order by collaterally attacking that order in the contempt proceeding. *See Maggio*, 333 U.S. at 74-75. The defendant may, however, make the distinct assertion that he has a "*present* inability to comply with the order in question." *United States* v. *Rylander*, 460 U.S. 752, 757 (1983); *see ibid.* ("While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action."); *Maggio*, 333 U.S. at 74-75.

B. The Family Court's Procedures Were Inadequate To Ensure An Accurate Determination Of Present Ability To Pay

The procedures employed by the family court violated petitioner's due process rights because they were inadequate to ensure that petitioner was not erroneously confined as an inducement to perform a task he was powerless to perform, while additional procedures to ensure petitioner's present ability to pay his child-support arrears would have been minimally burdensome.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976). Confinement for civil contempt is a deprivation of liberty, and the alleged contemnor is thus entitled to procedural due process protections before its imposition. Cf. *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972) (termination of parole triggers due process protections); see also *Bagwell*, 512 U.S. at 827 (civil contempt requires "notice and an opportunity to be heard").

The conclusion that due process applies is the beginning of the inquiry, not its end, because "the requirements of due process are 'flexible and cal[l] for such procedural protections as the particular situation demands.'" *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005) (brackets in original) (quoting *Morrissey*, 408 U.S. at 481). The Court has "generally * * * declined to establish rigid rules and instead ha[s] embraced a framework to evaluate the sufficiency of particular procedures." *Ibid.* That framework involves "consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.

Application of the *Mathews* factors here demonstrates that the family court proceeding did not comply with the requirements of procedural due process. First, petitioner's private interest in avoiding incarceration was significant. See *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992).

Second, there was a serious "risk of an erroneous deprivation" of petitioner's liberty interest under the procedures employed by the family court, and there would have been value in additional procedures. *Mathews*, 424 U.S. at 335. Petitioner did not dispute that he had failed to comply with his child-support order, so the propriety of his confinement for civil contempt thus turned on his present ability to do so. See pp. 17-18, *supra*; Pet. Br. 3-4 (petitioner's ability to pay "was the precise question before the family court"); *id.* at 17. But South Carolina automatically referred petitioner for contempt proceedings without considering whether petitioner was employed or had assets. At the contempt hearing, the court solicited no financial information from petitioner, nor was there apparently any mechanism in place for him to provide it on his own. Petitioner's statement at the hearing that he had been un-

able to work because he broke his back, Pet. App. 17a, could reasonably be understood to constitute a claim that he had no present ability to pay nearly $6000. The court did not explore this question, however; it made no inquiry into petitioner's income or assets. Instead, the court imposed a jail sentence unaccompanied by any finding that petitioner had the ability to pay off his outstanding balance from a jail cell.[7] Taking additional modest steps to determine whether petitioner had the present ability to discharge his obligation, see pp. 24-25, *infra*, would have improved the accuracy of the proceeding.

Finally, the government's interests also favor additional procedural safeguards to ensure that only those parents with a present ability to pay are confined for civil contempt. While the State has a strong interest in enforcing child-support orders, it secures no benefit from jailing a non-custodial parent who cannot discharge his obligation. The period of incarceration makes it less, rather than more, likely that such parent will be able to pay child support. See Elizabeth G. Patterson, *Civil Contempt & the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 126 (2008) (*Civil Contempt*). Meanwhile, the State incurs the substantial expense of confinement.

Moreover, as a general matter, the routine use of contempt for non-payment of child support is likely to be an ineffective strategy for enforcing support orders. See National Child Support Enforcement, U.S. Dep't of Health & Human Servs., *Strategic Plan: FY 2005-2009*, at 2, 10 (*Strategic Plan*), http://www.acf.hhs.gov/

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[7] The judge told petitioner, "[i]f you've got a job, I'll make you eligible for work release." Pet. App. 18a, but petitioner states he was ineligible for work release. Pet. Br. 12 n.8.

programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf. While child-support recovery efforts once "followed a business model predicated on enforcement" that "intervened only after debt, at times substantial, accumulated and often too late for collection to be successful, let alone of real value to the child," experience has shown that alternative methods—such as order modifications, increased contact with non-custodial parents, and use of "automation to detect non-compliance as early as possible"—are more effective. *Id.* at 2.

A substantial portion of child-support obligors have no or low reported income. Elaine Sorensen et al., *Assessing Child Support Arrears in Nine Large States & the Nation* 22 (2007) (*Assessing Child Support Arrears*), http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf (obligors with $10,000 or less in annual income constituted half of the child-support obligors and owed 70% of the arrears in a nine-state study). Such individuals' child-support obligations are often substantial. See *id.* at 54 ("For obligors with reported income of $10,000 a year or less, the median percent of reported income that was due as current support was 83[%]."). A low-income individual in arrears on child-support payments is "rarely a candidate for civil incarceration because of the likelihood that he or she is unable to pay the hefty sum represented by the accumulated arrears, or even a portion thereof that may be set by the court as the purge amount." *Civil Contempt* 116.[8]

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[8] To be sure, coercive enforcement remedies, such as contempt, have a role to play in child-support enforcement efforts, such as with non-custodial parents who are hiding assets or unreported self-employment or under-the-table income. See *Strategic Plan* 2; *Assessing Child Support Arrears* 45, 22-23, 25; *Civil Contempt* 97. There is no evi-

Many States have taken alternative steps to avoid child-support arrears, such as establishing more realistic support orders, "increas[ing] parental participation in the order establishment process," providing employment services to non-custodial parents, or using automation tools to improve wage withholding. *Assessing Child Support Arrears* 10-11, 80-89; see *id.* at 85 (study of Florida program that provides employment services and case management to non-custodial parents found that program participants paid nearly five dollars in child support for every dollar spent on the program). Such alternatives, which focus on early intervention rather than after-the-fact efforts to collect substantial accumulated arrears, are more likely to be effective means of enforcing the child-support obligations of the substantial number of low-income obligors. See *Strategic Plan* 2.

C. Due Process Can Be Satisfied By A Variety Of Procedures Intended To Assure An Accurate Determination Of Present Ability To Pay In A Civil Contempt Proceeding

Petitioner argues that, in order to ensure that his civil contempt proceeding "remain[ed] civil," Pet. Br. 39, due process required the appointment of counsel to assist him in establishing his inability to comply with the court's order, see *id.* at 41. Although we agree that petitioner's due process rights were violated, we disagree that the State's failure to appoint counsel was itself the basis of the violation. Appointment of counsel is certainly one way to help ensure an accurate determination of the obligor's current ability to pay—the determination on which the "civil" nature of a civil contempt sanction rests—but it is not the only way. It was the State's

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dence, however, that routine use of contempt among low-income non-custodial parents is generally effective. See *Civil Contempt* 126.

failure to provide any meaningful mechanism for making that determination in this case, and not its failure to provide counsel in particular, that violated petitioner's due process rights.[9]

1. Courts can comply with due process by providing a meaningful opportunity for an alleged contemnor to establish h[illegible]resent ability to pay

While there is no basis for a constitutional rule categorically requiring appointment of counsel in all civil contempt that could lead to deprivation of physical liberty, see pp. 25-32, *infra*, due process does require procedures sufficient to ensure fundamental fairness. In the context of a civil contempt proceeding for non-payment of child support that could lead to confinement, this means procedures adequate to allow a pro se contemnor to attempt to carry his burden of establishing his present inability to pay.

Such procedures may include requiring a non-paying parent to complete an understandable form seeking financial information. South Carolina already requires

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[9] Although petitioner's submissions below and in this Court have focused on the value of appointed counsel in ensuring that indigent child-support obligors are not erroneously jailed as a means of inducing them to comply with their obligations, see, *e.g.*, Pet. i, Pet. App. 13a, fairly encompassed in those submissions is the proposition that due process demands an appropriate procedure to evaluate an obligor's present ability to pay. See Sup. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). In conducting that inquiry, it should be open to the Court to consider whether there are alternative procedures, other than the specific procedure petitioner has proposed, that would satisfy constitutional requirements. To the extent the Court concludes otherwise, however, the proper course would be to dismiss the writ of certiorari as improvidently granted and await a case that expressly raises a broader due process claim.

noncustodial parents to fill out such a form when a support order is originally sought in a Title IV-D case, see S.C. Code Ann. § 43-5-220(e) (West Supp. 2009), but apparently does not do so in subsequent contempt proceedings. Requiring that such forms be completed at the outset of a contempt proceeding would impose little expense on the State or burden on the proceeding while materially advancing the accuracy of the court's determination. Such information could by itself establish the contemnor's present inability to pay his arrears or, conversely, demonstrate his ability to pay. To the extent the court had questions about the information on the form or disbelieved it, the court could question the contemnor about his finances at the contempt hearing. Such simple, minimally burdensome procedures would enable the court to evaluate whether the alleged contemnor has the ability to pay his arrears and is thus an appropriate candidate for a civil contempt sanction.

2. There is no basis for an inflexible right to counsel rule in civil contempt proceedings

Although the constitutional inadequacy of the family court's procedures could have been cured by appointment of counsel (who presumably would have addressed petitioner's inability to pay his arrears and urged the court not to jail him for that reason), appointment of counsel was not constitutionally compelled.

a. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Lujan* v. *G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (quoting *Cafeteria & Rest. Workers* v. *McElroy*, 367 U.S. 886, 895 (1961)); see *Mathews*, 424 U.S. at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular

situation demands.") (brackets in original) (quoting *Morrissey*, 408 U.S. at 481). The question in a due process case is how to ensure a fundamentally fair proceeding, taking into account the importance of the private interest at issue, the risk of error and value of additional procedures, and the government's interest. See *id.* at 335. This is not an inquiry that typically lends itself to the kind of categorical approach advocated by petitioner. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789 (1973) (contrasting categorical Sixth Amendment right to counsel in criminal prosecution "with the more limited due process right" in other contexts).[10]

In fact, in areas outside traditional criminal prosecutions where an individual's liberty is nonetheless at stake, the Court has declined to recognize a categorical right to counsel, instead relying on alternative procedural safeguards to ensure due process. See *Gagnon*, 411 U.S. at 782-790; see also *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) (no due process right to counsel for summary courts-martial).[11] For example, in *Gagnon*,

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[10] The Sixth Amendment right to counsel is inapplicable to a civil contempt proceeding because it is not a "criminal prosecution[]." U.S. Const. Amend. VI; see *Bagwell*, 512 U.S. at 826-827.

[11] In *In re Gault*, 387 U.S. 1 (1967), the Court recognized a due process right to appointed counsel in a juvenile delinquency proceeding, but, as the Court later explained, that was because the proceeding "while denominated civil, was functionally akin to a criminal trial." *Gagnon*, 411 U.S. at 789 n.12. In *Vitek* v. *Jones*, 445 U.S. 480 (1980), a plurality would have held that there is a due process right to counsel before a State involuntarily transfers a prisoner to a state mental hospital for psychiatric treatment. See *id.* at 497. Justice Powell's controlling concurrence, however, disagreed, concluding that "the fairness of an informal hearing designed to determine a medical issue" does not "require[] participation by lawyers." *Id.* at 500. Justice Powell agreed that a prisoner "required assistance" in such a proceeding to ensure

the Court held that due process required the government to provide a preliminary and final hearing before it could incarcerate an individual for violating the terms of his probation. See 411 U.S. at 782; see also *id.* at 785-786 (hearings necessary in order to provide notice of the alleged probation violation and ensure "accurate finding of fact and the informed use of discretion"). At the same time, however, the Court rejected the "contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases." *Id.* at 787; see *id.* at 790 (stating that due process may require appointment of counsel in exceptional cases). The Court recognized that "such a rule has the appeal of simplicity" but concluded that "it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel." *Id.* at 787.

The Court in *Gagnon* noted that in many cases a probationer's mitigating evidence may be "so simple as not to require either investigation or exposition by counsel." 411 U.S. at 787. Here too, with the provision of easy-to-understand forms on assets and income and, if necessary, a colloquy with the trial court, it will often be simple for a delinquent child-support obligor to demonstrate his present inability to discharge his obligation without the assistance of appointed counsel. Indeed, even in criminal cases to which the Sixth Amendment right of counsel applies, defendants are not entitled to government-appointed counsel for the purpose of filling out the forms routinely used to establishing their financial eligibility for government-appointed counsel. See

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fairness, but said that it could be "rendered by competent laymen in some cases." *Ibid.*

18 U.S.C. 3006A(b) (counsel will be appointed only after court is "satisfied after appropriate inquiry that the person is financially unable to obtain counsel"); *United States* v. *Bauer*, 956 F.2d 693, 695 (7th Cir.) ("Under the Criminal Justice Act, the public fisc need not contribute one penny unless the accused first establishes that he cannot afford counsel. Nothing in the statute directs the Treasury to assist the accused in making this determination."), cert. denied, 506 U.S. 882 (1992). Just as "[n]o legal expertise is needed to participate effectively in hearings under the Criminal Justice Act," *ibid.*, no legal expertise is generally required to establish inability to pay child-support arrears.

Gagnon also expressed concern that "[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding," since the States typically relied on probation officers to conduct revocation hearings but might turn to attorneys if all probationers were represented. 411 U.S. at 787. "[T]he decisionmaking process will be prolonged, and the financial cost to the State * * * will not be insubstantial." *Id.* at 788. In the context of civil contempt for child support as well, automatic appointment of counsel could delay the proceedings, create an asymmetry in representation between non-custodial parents and custodial parents who may appear pro se, see, *e.g.*, Pet. App. 16a, and impose considerable financial cost on the government without an automatic increase in accuracy.

Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981), upon which petitioner relies, see, *e.g.*, Pet. Br. 32-33, is not to the contrary. In that decision, the Court held that there was no due process right to counsel in a parental-rights termination proceeding. See *Lassiter*, 452 U.S. at 32-33. In dictum, the Court said its cases

had established a "presumption" that an indigent had a right to appointed counsel "when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. The Court has not subsequently relied on any such presumption derived from the *Lassiter* dictum, and *Lassiter* itself recognized that *Gagnon*, which involved a deprivation of physical liberty, had held that "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed" through appointment of counsel. *Id.* at 31 (quoting *Gagnon*, 411 U.S. at 788).

That there may be atypical cases with "complex factual and legal issues" (Pet. Br. 46) in which counsel would provide a significant benefit beyond what could be obtained through other procedural safeguards does not mean there should be a right to counsel. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985) (quoting *Mathews*, 424 U.S. at 344); see *id.* at 331 ("existence of complexity in some cases" was not "sufficient to warrant a conclusion that the right to retain and compensate an attorney in [Veterans Administration] cases is a necessary element of procedural fairness under the Fifth Amendment").

b. A recognition that due process requires fair proceedings before a child-support obligor can be held in civil contempt but that this due process right does not encompass appointment of government-funded counsel is also consistent with the balance struck by Congress and the Secretary in enacting and administering the Title IV-D program. Cf. *Middlesdorf*, 425 U.S. at 43 ("[W]e must give particular deference to the determina-

tion of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. 1, § 8, that counsel should not be provided in summary courts-martial."); *Wolfers*, 473 U.S. at 319-320 ("This deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment.").

Congress and the Secretary have demonstrated their concern that child-support-related proceedings be conducted fairly by repeatedly making compliance with procedural due process rules a requirement of State participation in the program.[11] At the same time, however, they have declined to reimburse the States for the cost of providing counsel to non-custodial parents. See S. Rep. No. 387, 98th Cong., 2d Sess. 23 (1984) (statute does not provide federal funding for "defense counsel for absent parents" or "incarceration of delinquent obligors"); 45 C.F.R. 304.23 (i) and (j) (no federal funding for "[t]he costs of counsel for indigent defendants in

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[11] See, *e.g.*, 42 U.S.C. 666(a)(3)(A) (reduction of non-custodial parents' state income tax refunds to pay overdue support permitted only "after full compliance with all procedural due process requirements of the State"); 42 U.S.C. 666(a)(7)(B)(i) (States must report child support delinquency to credit bureaus "only after [the] parent has been afforded all due process required under State law, including notice and a reasonable opportunity to contest the accuracy of such information."); 42 U.S.C. 666(a)(8)(B)(v) (income withholding "must be carried out in full compliance with all procedural due process requirements of the State"); 42 U.S.C. 666(c)(1)(H) (expedited State agency procedure "shall be subject to due process safeguards, including (as appropriate) requirements for notice, opportunity to contest the action, and opportunity for an appeal on the record to an independent administrative or judicial tribunal"); see also 45 C.F.R. 302.70(a)(5)(ii), 303.5(g)(2)(iii), 303.100(a)(6) & (f)(4), 303.101(c)(2), 303.102(c)(1), 303.104(b).

IV-D actions" or "[a]ny expenditure for jailing of parents in child-support enforcement cases"); see also 52 Fed. Reg. 32,130 (1987) (Federal "policy since the inception of the [Title IV-D] program has been that costs of incarceration of delinquent obligors and costs of defense counsel are not necessary and reasonable costs associated with the proper and efficient administration of the Title IV-D program.").

Finally, at its broadest, the categorical rule petitioner suggests—that there is a right to government-appointed counsel in all "proceedings denominated as 'civil' where an individual nonetheless faces the prospect of confinement to state custody," Pet. Br. 30—conflicts with Congress's express judgment that provision of government-funded counsel is not warranted in all such areas. See *Middendorf*, 425 U.S. at 43 (deferring to such a judgment); *Walters*, 473 U.S. at 319-320 (same); see also *Landon* v. *Plasencia*, 459 U.S. 21, 34-35 (1982) ("The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.").

For example, while aliens are sometimes detained during removal proceedings or pending enforcement of removal orders, Congress has long explicitly provided that there is no obligation to provide government payment for counsel in such proceedings. See 8 U.S.C. 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings,

as he shall choose.") (emphasis added); 8 U.S.C. 1229a(b)(4)(A). Congress's judgment is consistent with this Court's repeated holdings that removal proceedings are civil and non-punitive, see, *e.g.*, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."), and its conclusion that detention of an alien during the removal process is permissible because it is incidental to the proceedings, and not their purpose or goal, see, *e.g.*, *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."). As the Court has also noted, removal proceedings—whose purpose is removal of aliens from the country, not deprivation of their physical liberty—are "streamlined" administrative proceedings held before administrative personnel, immigration judges, under rules offering the aliens more limited procedural rights than are available in court. *Lopez-Mendoza*, 468 U.S. at 1039; see *ibid.* ("a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more"). The due process guarantee of fundamental fairness does not mandate the appointment of counsel in such proceedings, which would be contrary to the judgment of Congress.[11]

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[11] For those reasons, the lower courts have held that aliens in removal proceedings have no constitutional right to appointment of counsel at government expense. *United States* v. *Gasca-Ruiz*, 852 F.2d 148, 152 (5th Cir. 1988) ("courts have uniformly held in this circuit and elsewhere that in light of the non-criminal nature of both the proceedings and the order which may be a result, that respondents are not entitled to have counsel appointed at government expense") (citing cases); see *Mokdar*

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

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mad v. Gonzales, 400 F.3d 788, 793 (9th Cir. 2005); *United States v. Torres Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995); *Nazemian v. INS*, 981 F.2d 1146, 1148 (10th Cir. 1992); *United States v. Campos Asencio*, 822 F.2d 506, 509 (5th Cir. 1987).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 10-10

In the Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest 1

Summary of Argument 5

Argument 6

I. A Defendant Facing Incarceration for Contempt Should Be Provided Counsel Regardless of Whether the Proceeding Is Labeled "Civil" or "Criminal" 6

II. Where an Indigent Defendant Faces Incarceration for Contempt, the Appointment of Counsel Promotes the Fair and Efficient Administration of Justice 8

Conclusion 13

TABLE OF AUTHORITIES

Cases

Indiana v. Edwards,
554 U.S. 164 (2008) 11

Ridgway v. Baker,
720 F.2d 1409 (5th Cir. 1983) 7, 8

Wheat v. United States,
486 U.S. 153 (1988) 11

Rules

Sup. Ct. R. 37.6 1

Other Authorities

ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings 1 (adopted Aug. 9, 2010) 4

ABA Const. Art. 31.3 2

ABA Const. Art. 31.7 2

ABA Leadership, House of Delegates, General Information 2

ABA MODEL ACCESS ACT, 2010 Report with Recommendation #104 (blackletter and commentary of Model Act adopted Aug. 2010) 12

ABA MODEL ACCESS ACT § 1.F (adopted Aug. 2010)..... 12

ABA Report with Recommendation #112A (adopted Aug. 2006)..... 3

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSES SERVICES (3d ed. 1992)..... 3, 4, 6, 8

Brief *Amicus Curiae* of Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction of Original Action, *Kelly v. Warpinski*, No. 04-2999-OA, at 6 (Wis. 2004)..... 11

Brief of ABA Amicus Curiae at 9, *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340036..... 11

Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Jonsson at 14, *Office of Pub. Advocacy v. Alaska Court Sys.* (Alaska 2008) (No. S-12999), 2008 WL 5585566..... 10, 11, 12

Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95 (2008)..... 7, 9

Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 Fam. Ct. Rev. 36 (2002)..... 10

Legal Services Corporation's, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 10

Robert Monk, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. Chi. L. Rev. 326 (1983)... 7, 8, 9

Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998) 9

Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37 (2010) 10

Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385 (1995)..... 10

Task Force on Civil Equal Justice Funding, Washington State Supreme Court, *The Washington State Civil Legal Needs Study* 56 (2003) 12

STATEMENT OF INTEREST[1]

Amicus curiae the American Bar Association ("ABA") respectfully submits this brief in support of Petitioner Michael D. Turner and asks the Court to hold that the potential deprivation of a defendant's liberty interest requires the appointment of counsel for an indigent defendant who faces potential incarceration at a civil contempt hearing.

With nearly 400,000 members, the ABA is the leading national voluntary bar organization. Its members come from each of the fifty states, the District of Columbia, and the U.S. territories. Its membership is diverse, with attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors and law students.[2]

Since its inception over 100 years ago, the ABA has worked to improve the administration of justice

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no party or counsel for a party authored this brief in whole or in part, and that no person or entity, other than this *amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties consented to the filing of this brief, except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

and the judicial process. Its history reflects an unwavering commitment to the principle that society must provide equal access to justice, including meaningful access to legal representation for low-income individuals, in adversarial proceedings.

The ABA's Standing Committee on Legal Aid and Indigent Defendants, the ABA's first standing committee, was created in 1920 with Charles Evans Hughes, later Chief Justice of the U.S. Supreme Court, as its first chair.[3] This Standing Committee is tasked with the study of the administration of justice as it affects low-income individuals and remedial measures intended to help them protect their legal rights. ABA Const. Art. 31.7. In 1965, the ABA's House of Delegates adopted a policy that endorsed federal funding of legal services for low-income individuals after concluding that charitable funding would never meet the need.[4] As stated by then-ABA President, Lewis Powell, "It is fundamental that

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[3] ABA Standing Committees are entities charged with studying "continuing or recurring matters related to the purposes or business" of the ABA. ABA Const. Art. 31.3.

[4] The ABA's House of Delegates, with more than 500 delegates, is the ABA's policymaking body. Delegates represent states and territories, state local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Recommendations that are adopted by the House of Delegates become ABA policy. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html

justice should be the same, in substance and availability, without regard to economic status."[5]

The ABA also has worked to strengthen the legal system and the judicial process through the development of standards that represent the work of prosecutors, defense counsel, judges, court personnel, academics, and recognized experts in related fields, such as social work, psychology, health care, education, corrections, and law enforcement. Adopted by the ABA's House of Delegates, these standards provide guidance for the juvenile justice system, the criminal justice system, and judicial administration.[6]

Of particular relevance to this case are the ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSES SERVICES (3d ed. 1992), and specifically, the revisions made to Standards 5-5.1[7] and 5-5.2[8] and

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[5] ABA Report with Recommendation #112A, at 2 (adopted Aug. 2006), *available at* http://new.abanet.org/sdl/Documents/2006_AM_112A.pdf.

[6] ABA standards relating to juvenile justice are available at http://new.abanet.org/sections/criminaljustice/Pages/JuvenileJusticeStandards.aspx. ABA standards relating to criminal justice are available at http://new.abanet.org/sections/criminaljustice/Pages/Standards.aspx. ABA standards relating to judicial administration are available at http://new.abanet.org/divisions/Judicial/Pages/PublicationsStandards.aspx.

[7] "Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration."

[8] "Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition,

their Commentaries. As discussed further in the Argument section of this brief, revisions were made because "the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred." Commentary to Standard 5-5.2, at 65. Thus, "protected liberty interests" justify the provision of counsel to indigent defendants in "quasi-criminal" matters—including contempt proceedings for failure to make child support payments—regardless of their characterization as "civil" and regardless of whether the defendant is actually imprisoned. *Id.*; Commentary to Standard 5-5.1, at 62 n.7.

The ABA's work in the area of legal services to low-income persons also has led it to conclude that counsel should be provided as a matter of right to low-income persons in adversarial proceedings where basic human needs are at stake, such as those involving sustenance, safety, health, or child custody determinations. *See, e.g.*, *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* 1 (adopted Aug. 9, 2010).[9] The rationale underlying these *Basic Principles* also supports a right to counsel in civil contempt cases where an indigent defendant faces potential incarceration.

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mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature."

[9] The *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* are available at www.abanet.org/legalservices/sclaid/downloads/105_Revised_FINAL_Aug_2010.pdf.

With its long history of work to protect the rights of low-income individuals, the ABA respectfully suggests that its views may assist the Court in this matter.

Summary of Argument

Where an indigent defendant faces incarceration for contempt of court, the potential deprivation of the defendant's liberty interest warrants the appointment of counsel—regardless of whether the proceeding is labeled "civil" or "criminal"—to ensure the fair and efficient administration of justice. The line between civil and criminal contempt proceedings has become increasingly blurred, and thus cannot provide a useful basis for determining the right to counsel where personal liberty is at stake.

The appointment of counsel promotes the fair and efficient administration of justice. Concerns over increased administrative and financial burdens associated with providing counsel must be balanced against the costs of improper incarceration, as well as any gains from negotiation of an order with which a defendant can comply. Appointment of counsel promotes the public's interest in obtaining correct outcomes and in efficient use of judicial time and resources.

As the Court has noted, court proceedings must not only be fair, but also must appear to be fair. Representation enhances public confidence and results in increased satisfaction in legal outcomes and respect for the justice system.

Counsel should be provided in these circumstances, accordingly, because of the potential

deprivation of the defendants' liberty interests, and because representation will result in fairer outcomes with greater judicial efficiency and will increase public confidence in our judicial system.

ARGUMENT

The ABA submits that, where an indigent defendant faces incarceration for contempt of court, the potential deprivation of the defendant's liberty interest warrants the appointment of counsel—regardless of whether the proceeding is labeled "civil" or "criminal"—to ensure the fair and efficient administration of justice.

I. A Defendant Facing Incarceration for Contempt Should Be Provided Counsel Regardless of Whether the Proceeding Is Labeled "Civil" or "Criminal."

In the ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992), the ABA noted that "the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such 'quasi-criminal' matters as contempt for failure to make child support payments . . . ." Commentary to Standard 5-5.2, at 65.

The ABA called for counsel in all proceedings for offenses punishable by incarceration, "regardless of their denomination as felonies, misdemeanors, or otherwise." Standard 5-5.1. In support, the ABA noted a civil contempt case involving noncompliance with a child support order. Commentary to Standard

5-5.1, at 62 n.7 (citing *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983)). Like the ABA, the *Ridgway* court recognized that "the line between civil and criminal contempt is rarely as clear as the state would have us believe." *Ridgway*, 720 F.2d at 1414. Rejecting the state's argument that a defendant at a civil contempt proceeding holds "the keys of his prison in his own pocket," the court stated that this old saying ignores two salient facts: "that the keys are available only to one who has enough money to pay the delinquent child support and that, meanwhile, the defendant, whatever the label on his cell, is confined." *Id.* at 1413-14.

The *Ridgway* court also observed that an error in a contempt finding is more likely to occur if the defendant is denied counsel. *Id.* at 1414; *see also* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 122 (2008); Robert Monk, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. Chi. L. Rev. 326, 339 (1983) ("determination of an indigent's ability to comply is especially delicate and susceptible to error"). While coercive contempt is premised on a finding that the defendant can, but is refusing, to comply with the court's order, few lay persons have the training or experience needed to carry the burden of showing that they are not able to comply, even when not under the pressure of potential incarceration.

Further, a contempt proceeding can be converted from civil to criminal through a sentence that is not coercive but is, instead, punitive. "Even a

dispassionate court may mistakenly believe that it is authorized to impose a jail sentence on a defendant without the means to pay, in order to motivate him to greater diligence in the future. Such a sentence is not coercion[. While] the court hopes to deter future noncompliance . . . [,] deterrence is one of the classic aims of punishment." Monk, *supra*, at 340.

As the *Ridgway* court stated in 1983: "The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or civil.'" 720 F.2d at 1413. Because there can be no dispute that, when a defendant faces a potential for incarceration at a civil contempt proceeding, his or her liberty interest is at stake, the ABA urges that an indigent defendant should have a right to counsel in these circumstances.

II. Where an Indigent Defendant Faces Incarceration for Contempt, the Appointment of Counsel Promotes the Fair and Efficient Administration of Justice.

The need "to assure fair proceedings" was a key consideration when the ABA formulated the right to counsel principles embodied in Standards 5-5.1 and 5-5.2. *See, e.g.*, Commentary to Standard 5-5.1, at 62. While recognizing the concerns that right to counsel issues raise over increased administrative and financial burdens, the ABA concluded that, where a person's liberty interest is at stake, the provision of counsel is essential to both the fair and the efficient administration of justice. In other words, providing counsel to indigent defendants facing incarceration at civil contempt proceedings for

the nonpayment of child support is not only the right, but also the practical, thing to do.

While appointing counsel in these circumstances would necessarily add costs, those costs must be balanced with savings and, potentially, increased support payments that can result. First, providing counsel for indigent defendants does not necessarily result in reduction of support payments: "If [the defendant] cannot pay, then he will not pay, whether confined or not, and whether represented by counsel or not." Monk, *supra*, at 345.

Further, appointed counsel can guard against the improper use—and the costs—of incarceration. *See* Monk, *supra*, at 345. And, in the event of a finding of contempt, counsel can assist the court in fashioning—where a lesser sanction than incarceration would yield compliance—an order that is most likely to be complied with based on the defendant's available resources; counsel can also appeal to the court's considerable discretion in imposing a lesser sanction. *See* Patterson, *supra*, at 122; *see also* Monk, *supra*, at 339.

Moreover, appointment of counsel in these circumstances promotes the public's interest in obtaining the correct outcome. As one federal district court judge has stated, "As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel." Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998). Knowledge of and the ability to present substantive claims and defenses substantially increase a litigant's chances of

achieving outcomes that reflect the underlying merits of his or her case. Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385, 413-14, Tbl.18 (1995).[10] In short, "Lawyers matter in two main ways: 'by increasing the accuracy of legal decision-making and by conferring advantage on represented parties.'" Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Jonsson at 14, *Office of Pub. Advocacy v. Alaska Court Sys.* (Alaska 2008) (No. S-12999), 2008 WL 5585566 ("*Jonsson* Amicus Brief") (citation omitted). Unrepresented defendants, for example, "routinely bring in letters with out-of-court statements and are perplexed when these testimonials are excluded, sometimes ending the case." *Id.* at 11-12. "'It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence.'" *Id.* at 11 (quoting Jona Goldschmidt, *The*

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[10] Several recent studies confirm that, in various types of civil matters, access to legal counsel positively impacts litigation results for individuals. These include the Legal Services Corporation's 2009 update to its 2005 Report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf. *See also* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37 (2010) (discussing empirical data in numerous civil contexts, including eviction proceedings, family law proceedings, consumer actions, administrative actions, unemployment compensation appeals, and immigration cases).

Pro Se Litigant's Struggle for Access to Justice, 40 Fam. Ct. Rev. 36, 52 (2002)).[11]

Appointment of counsel in these circumstances also promotes the efficient administration of justice. As an amicus brief filed by a group of judges noted, when cases are presented pro se, judges have to spend "an inordinate amount of time deciphering pleadings[,] and hearings, when properly scheduled, are slow and onerous."[12] In the *Jonsson* Amicus Brief, that group of judges noted that, "With court time at a premium, any inordinate attention that must be paid to pro se cases has a ripple effect. . . . [T]he community as a whole is impacted by the backlog created by the spillover from pro se cases."[13]

Finally, as this Court has noted, court proceedings must not only be fair, but also must "'appear fair.'" *Indiana v. Edwards*, 554 U.S. 164, 177 (2008) (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)). While those imprisoned for civil

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[11] Indeed, it has long been the ABA's position that "[s]killed counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . [*P*]*ro se* litigants cannot adequately perform any of these tasks." Brief of ABA Amicus Curiae at 9, *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340036.

[12] Brief *Amicus Curiae* of Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction of Original Action, *Kelly v. Warpinski*, No. 04-2999-OA, at 6 (Wis. 2004), *available at* http://www.povertylaw.org/poverty-law-library/case/55800/55816/55816C1.pdf.

[13] *Jonsson* Amicus Brief, at 20-21 (internal quotation marks and citation omitted).

contempt do not carry all of the trappings of one convicted of a crime (*see* Opp. at 27-28), most lay persons aware of the incarceration undoubtedly would fail to comprehend the subtle difference between being jailed for civil contempt versus for a criminal conviction.

On the other hand, public confidence is enhanced through representation by counsel. As found by a Washington state task force, representation not only increased satisfaction with the legal outcomes, but also greatly increased respect for the justice system overall. *Jonsson* Amicus Brief at 15 (citing Task Force on Civil Equal Justice Funding, Washington State Supreme Court, *The Washington State Civil Legal Needs Study* 56 (2003)). This task force concluded that, among low-income people who sought and received an attorney's help, 27% were "very positive" and 27% were "somewhat positive" in their attitudes toward the justice system, while only 3% and 18% had such views, respectively, if they had tried but failed to get an attorney's help. *Id.*

In 2010, the ABA adopted the MODEL ACCESS ACT, having concluded that "[p]roviding legal representation to low-income persons at public expense will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants, will produce fairer outcomes, and will promote public confidence in the systems of justice." *See* ABA MODEL ACCESS ACT § 1.F (adopted August 2010).[14]

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[14] *See also* ABA MODEL ACCESS ACT, 2010 Report with Recommendation #104 (blackletter and commentary of Model Act adopted Aug. 2010), Report at 9 (urging adoption of Model

Based on its years of research, study, and experience, the ABA accordingly urges that providing counsel to indigent defendants facing incarceration at civil contempt proceedings—regardless of whether the proceedings are labeled "civil" or "criminal"—is not only necessary because of the potential deprivation of the defendants' liberty interests, but also to ensure the fair and efficient administration of justice.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association requests that the judgment of the Supreme Court of South Carolina be reversed.

Act as model for implementing jurisdictions in addressing civil right to counsel where basic human needs at stake), *available at* http://new.abanet.org/sdl/Documents/2010_AM_104.pdf.

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AMICUS CURIAE BRIEF

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REBECCA L. ROGERS AND LARRY E. PRICE, SR.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. Appointing Counsel for Contemnor Fathers Facing Unrepresented Mothers in Child Support Enforcement Proceedings Does Not Enhance the Fair and Efficient Administration of Justice	2
II. Extending *Gideon* to Civil Contempt Proceedings Such As This One Will Frustrate the Principles and Purpose of *Gideon* Itself by Drawing Resources Away from Those Criminal Defendants Who Benefit the Most from the Appointment of Counsel	13
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 3, 13

Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 3

Gideon v. *Wainwright*, 372 U.S. 335 (1963) ..... *passim*

Indiana v. *Edwards*, 554 U.S. 164 (2008) 6

Lassiter v. *Dep't of Soc. Servs.*, 452 U.S. 18 (1981) 3, 10

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 10

Pasqua v. *Council*, 186 N.J. 127 (2006) 18

OTHER AUTHORITIES

American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004) 17

Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 Fla. L. Rev. 1227 (2010) ..... *passim*

D. James Greiner & Cassandra Wolos Pattanayak, *What Difference Representation?* (January 13, 2010), *available at* http://ssrn.com/abstract=1708664 ..... 6, 7, 8

Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 Wash. U. J.L. & Pol'y 47 (2003) 11, 20, 21

TABLE OF AUTHORITIES – Continued

Page

Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95 (2008) 20

Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423 (2007) 5, 6

Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461 (2007) ..... *passim*

Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 Harv. L. Rev. 2062 (2000) 14

John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 Val. U. L. Rev. 925 (2005) 17, 21

Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 Fam. Ct. Rev. 36 (2002) 11

Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031 (2006) 17

Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 Cardozo Pub. L. Pol'y & Ethics J. 659 (2006) 11

TABLE OF AUTHORITIES – Continued

Page

Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999) 11

Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 367 (2008) 11

Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969 (2004) 11

The Constitution Project National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009) 14

INTEREST OF *AMICI CURIAE*

Amici are scholars who have researched solutions for providing effective assistance to indigent litigants. *Amici* have studied methods for improving the institutions and institutional actors involved in the judicial system to enhance the efficacy of such proceedings for *pro se* litigants. Their findings are relevant to the questions facing this Court.[1]

SUMMARY OF ARGUMENT

1. Courts must ensure that indigent defendants receive fair and accurate hearings that comport with due process and fundamental fairness. But creating a categorical right to an appointed attorney for contemnor fathers in civil child support enforcement hearings is not necessary to ensure that these hearings satisfy the requirements of due process. Child support enforcement proceedings are generally straightforward hearings on the factual question of the contemnor parent's ability to pay. Implementing basic procedural reforms to make these proceedings accessible to *pro se* litigants can ensure that these

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

hearings satisfy the requirements of due process, and all at a lesser cost than requiring appointed counsel.

2. Extending *Gideon* to civil contempt proceedings like these will further burden already strained public defense systems. Public defenders struggle to provide vigorous representation for those criminal defendants who require it the most. Given the limited resources available for public defense, extending *Gideon* to civil contempt will only draw scarce resources away from those criminal defendants who gain the greatest benefit from the assistance of appointed counsel.

ARGUMENT

I. Appointing Counsel for Contemnor Fathers Facing Unrepresented Mothers in Child Support Enforcement Proceedings Does Not Enhance the Fair and Efficient Administration of Justice

This Court has long recognized that for a defendant to receive a fair and accurate trial, he must stand "equal before the law" with his accusers. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). In an adversarial criminal proceeding, an indigent defendant without access to counsel cannot adequately mount a sufficient defense. *Id.* Appointment of counsel in such cases ensures a proceeding where the defendant has the ability to be heard, thereby reducing the likelihood of an erroneous result. *Id.* In such

circumstances, the State must appoint counsel in order to ensure the fairness of the proceedings and the accuracy of the final result. See *Gideon*, 372 U.S. 335; *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

But where evenly matched parties confront one another in simple and straightforward proceedings, the same concerns underlying the *Gideon* line of cases weigh against disrupting the balance of resources. In child support enforcement proceedings, appointing counsel for the contemnor father while leaving the unrepresented and often indigent mother to advocate on her own behalf would tip the scales in favor of the contemnor. It would now be the unpaid and often indigent mother who "plainly is outstripped" by the resources amassed against her as she seeks to secure the financial support necessary to raise her child. See *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting) (explaining that it is the imbalance of power between the parties that results in a proceeding that violates due process).

In *pro se* proceedings to enforce child support such as the one at issue in this case, two unrepresented parents appear before the court to determine the straightforward factual question of the contemnor parent's ability to pay. The contemnor parent is not facing a formal adversarial proceeding against the full prosecutorial and investigative resources of the State. In fact, the State is generally not present or says nothing in these proceedings. In such a setting, the appointment of counsel is not necessary to protect the contemnor father. *Id.*; see also *Gagnon* v.

Scarpelli, 411 U.S. 778, 789 (1973) (where the State is not represented by a prosecutor, formal procedures and formal rules of evidence are not employed, members of the hearing body are familiar with the problems and the practice at issue, and counsel is not necessary).

Moreover, far from being a complex legal proceeding, these hearings involve only the straightforward factual question of the contemnor's ability to pay. This is the same inquiry courts routinely make to determine if appointed counsel is required in criminal cases. It is a determination that courts are adept and experienced at making, and it requires the contemnor to provide only basic information about his personal finances. More intricate questions of proof and evidence are generally not at issue. Because child support enforcement proceedings are generally brief and the issues and evidence presented are relatively simple, the aid of counsel is not required. See *id.* at 787, 790 (where the evidence is simple and straightforward, investigation or exposition by counsel is unnecessary).

The empirical data supports the conclusion that adding appointed counsel to child enforcement proceedings may provide only marginal benefit to the father, while doing little to enhance the accuracy or efficacy of these hearings.

A recent empirical study by Professor Erica J. Hashimoto suggests that the appointment of counsel in federal misdemeanor cases does not provide a

significant benefit to the represented defendant. Specifically, Prof. Hashimoto found that federal *pro se* misdemeanor defendants achieve better results than represented defendants in all categories of cases other than DUI. And *pro se* federal misdemeanor defendants fared better than their represented counterparts in the sentencing process. Prof. Hashimoto concludes that "the empirical evidence suggests that *counsel in misdemeanor cases do not typically provide significant benefits to many of their clients*." Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461, 461 (2007) (emphasis added). "Indeed, pro se misdemeanor defendants in federal court appear both to have lower conviction rates and to receive more favorable sentencing outcomes than represented misdemeanor defendants." *Id.* at 489. Prof. Hashimoto therefore determines that the value added by counsel in simple misdemeanor cases is far less than the value added by counsel in more complex and serious cases. *Id.* at 466.

In a similar study, Prof. Hashimoto found that *pro se* felony defendants in state courts are convicted at rates equivalent to or lower than the conviction rates of represented felony defendants. They also garner a higher percentage of dismissals and deferred adjudications than their represented counterparts, and the overall acquittal rate of *pro se* defendants is higher than the overall acquittal rate of represented defendants. See Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423,

449-51 (2007). While Prof. Hashimoto acknowledges the limitations of her data, she nonetheless concludes that this data "certainly undermine[s] the assumption that decisions to engage in self-representation necessarily lead to bad outcomes." *Id.* at 450; see also *Indiana* v. *Edwards*, 554 U.S. 164, 178-79 (2008) (citing Prof. Hashimoto's research to refute concerns that the right to self-representation has led to trials that are unfair to the *pro se* defendant).

In the civil context, Professors D. James Greiner and Cassandra Wolos Pattanayak recently conducted a randomized trial to determine how much difference legal representation makes with respect to low-income clients in civil cases. Their data demonstrated that the offer of representation in administrative hearings to determine eligibility for unemployment benefits had no effect on the probability of success in the proceeding, but did cause a delay in resolution. These results led them to conclude that the defendants would likely have been better off had they appeared *pro se*. D. James Greiner & Cassandra Wolos Pattanayak, *What Difference Representation?* at 1 (January 13, 2010), *available at* http://ssrn.com/abstract=1708664. The authors opined that one possible explanation for this result is that in the types of proceedings studied, the issues presented and the procedures used are sufficiently simple and straightforward enough that the system is accessible to *pro se* litigants. Therefore, counsel provided little additional value. *Id.* at 46-47.

Although Prof. Greiner and Prof. Pattanayak concluded that it would be a mistake to overgeneralize

from the results of their study, they determined that this "startling" result merited additional investigation and undertook a comprehensive review of the literature studying the effect of representation in civil proceedings. After analyzing the body of scholarship on this issue, the authors determined that "we currently have astonishingly little credible, objective information about the effect of representation." *Id.* at 70. Specifically, Profs. Greiner and Pattanayak found that most studies attempting to measure the impact of representation were observational case studies that suffered from severe methodological flaws, rendering their findings unreliable. There were virtually no randomized empirical studies that could produce statistically significant results, and the two studies that were methodologically sound produced conflicting findings. *Id.* at 51-52, 70.

The observational case study of Elizabeth Patterson suffers from many of the methodological flaws discussed by Profs. Greiner and Pattanayak. See Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as *Amici Curiae* in Support of Petitioner. Patterson's study purports to show that having counsel in child support contempt cases has a positive effect on outcomes for the contemnor parent. But the Patterson study does not control for selection effects or the relative strength of the obligors' defenses. For example, Patterson finds that child support obligors who appeared without counsel were held in contempt more than twice as often as obligors who were represented. Patterson

does not address the fact that many of the represented obligors had counsel as part of their pending workers' compensation or disability cases, which independently gave rise to valid defenses for non-payment.[2] The inability to control for such variables greatly undermines the reliability of this observational study.[3]

In contrast, the more rigorous empirical studies discussed above cast significant doubt on the assertions of *amici* that the appointment of counsel in these cases will greatly reduce the risk of error.[4] As Prof. Hashimoto asserts, "it appears that states could reduce the number of cases in which counsel is

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[2] See Brief of Respondents, at p. 55-56 n. 17.

[3] Prof. Greiner and Prof. Pattanayak explain that observational studies generally suffer from at least one of three types of methodological problems: "the failure to define an intervention being studied, the failure to account for selection effects . . . and the failure to follow basic statistical principles to account for uncertainty." See Greiner & Pattanayak, *What Difference Representation?* at 53. Due to these significant methodological flaws, they conclude that "*the results in these studies are unworthy of credence.*" *Id.* at 54 (emphasis added). More importantly, they worry that the "failure to address these methodological concerns may cause, and probably has caused in many instances, the following, easy-to-understand consequence: the wrong answer." *Id.* at 51.

[4] See, *e.g.*, Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, The Brennan Center for Justice, the National Legal Aid & Defender Association, The Southern Center for Human Rights, and the American Civil Liberties Union in Support of Petitioner, at 26-30; Brief of Center for Family Policy and Practice as *Amicus Curiae* in Support of Petitioner, at 16-19.

appointed without significantly undermining the accuracy of the results in those proceedings." Hashimoto, 49 Wm. & Mary L. Rev. at 466.

These studies further suggest that even if forcing civil litigants to proceed *pro se* in civil contempt proceedings violated fundamental fairness and due process, it is not clear that the most effective remedy would be to provide a court-appointed lawyer. Given the dearth of empirical data affirming the efficacy of appointed counsel, this Court should consider other alternatives for improving the fairness and accuracy of judicial proceedings for *pro se* parties.

For example, better enabling both parties to represent themselves as *pro se* litigants may be a more efficacious approach. See Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 Fla. L. Rev. 1227 (2010). Prof. Barton concludes that while *Gideon* is "absolutely the right decision[,]" extending *Gideon* to civil cases would likely only lead to "overwhelmed lawyers, frustrated clients, and no justice." *Id.* at 1263. Prof. Barton explains that "[e]xperience teaches that the most the poor can hope for is more lawyers or more process, with little of substance to show for it." *Id.* at 1269.

Prof. Barton instead suggests a systematic effort to simplify the law and procedures in courts with a large *pro se* docket would improve outcomes and do more for the poor than a guarantee of counsel. And all at less cost. As he explains, "[t]oo often, access to justice only means access to lawyers. Rather than

seeing the plight of the poor as an opportunity to fund more lawyers, we should see it as an opportunity to make American law simpler, fairer, and more affordable." *Id.* at 1233-34.

For whatever reason, courts seem very comfortable requiring appointment of counsel in response to a perceived violation of due process. But there is no constitutional reason why that should be the case. In *Matthews* and *Lassiter* this Court reaffirmed that a case-by-case review is necessary to determine whether fundamental fairness has been violated in a given proceeding. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); *Lassiter*, 452 U.S. at 35. Reviewing courts are required to assess the entire process at issue, not just the availability of an appointed lawyer. Where the court process is simple and straightforward, and the court makes a clear effort to assist *pro se* litigants, the case for a categorical right to appointed counsel is much weaker.

Prof. Barton suggests that simple reforms, such as revamping court forms and processes so that they are more clear and transparent for *pro se* litigants, can improve the ability of these litigants to represent themselves in a traditional courtroom. Barton, *Against Civil Gideon* at 1273. Prof. Barton points out that a number of courts are already undertaking such changes. For example, the Eastern District of New York has created a federal magistrate position assigned to hear *pro se* cases, and San Antonio and other cities have also established specialized *pro se*

courts that have adopted specific procedures for better accommodating *pro se* litigants. *Id.* at 1271-72.

A number of other scholars have begun to advocate for *pro se* court reform as a more effective means of providing equal justice to indigent parties than supplying appointed counsel. Recognizing that the scarce financial resources available for appointed counsel will never suffice to eradicate the inequality facing indigent litigants, these scholars have undertaken extensive studies to explore how to adapt our current court system to better respond to the needs of *pro se* parties. See Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969 (2004); Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 Wash. U. J.L. & Pol'y 47 (2003).[5] While there is significant debate regarding the details of such reforms, it is notable that scholars have moved away from the notion that only appointed counsel can

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[5] Barton highlights a number of studies in this area, including Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 367 (2008); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 Fam. Ct. Rev. 36 (2002); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 Cardozo Pub. L. Pol'y & Ethics J. 659 (2006).

remedy the representation needs of the poor. See Barton, 62 Fla. L. Rev. at 1272.

In fact, appointing a lawyer is a backward-looking solution in these types of cases. Courts that retrain court personnel to assist *pro se* litigants and utilize technology can improve fairness and participation, all at a lesser cost than appointing a lawyer in every contempt case. The area of child support is particularly well suited to this approach, since the ability-to-pay calculation is a straightforward math problem. Many jurisdictions already use software to calculate payments: the non-custodial parent reports his or her income and the computer program calculates a payment number. In contempt cases, there may be extenuating circumstances to explain non-payment, but again, these are factual issues easily raised by the non-custodial parent. They are not complicated legal issues. If there is any issue that litigants are capable of arguing on their own, and that judges are capable of determining without lawyers, it is whether a litigant can or cannot afford a required payment.

In child support enforcement proceedings, such simple and straightforward reforms are likely to be the most effective way of ensuring that the court accurately determines whether the contemnor parent has the ability to pay the required child support. As the United States explains, "simple, minimally burdensome procedures" such as providing the non-paying parent with an understandable form seeking financial information will often be effective to satisfy

due process. "In the typical case, providing basic information about one's personal finances is not the kind of undertaking that requires assistance of counsel." See Brief for the United States as *Amicus Curiae* Supporting Reversal, at 12, 27 (explaining that even in criminal cases, defendants do not have a right to appointed counsel for assistance with filling out the forms that establish their financial eligibility for government-appointed counsel).

Given the straightforward nature of child support enforcement proceedings, and the relative balance of resources between the parties, adding lawyers may do little more than increase the contentiousness and prolong the duration of the proceeding. Instead of injecting an adversarial edge into these hearings by appointing counsel, better enabling both parties to represent themselves as *pro se* litigants before the court in a non-adversarial, fact-finding proceeding may be a more efficacious and just approach.

II. Extending *Gideon* to Civil Contempt Proceedings Such As This One Will Frustrate the Principles and Purpose of *Gideon* Itself by Drawing Resources Away from Those Criminal Defendants Who Benefit the Most from the Appointment of Counsel

Gideon promised to provide an equal voice to indigent defendants before the law. Yet it has long been a concern that expanding this right to appointed counsel would overwhelm the justice system. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 62 (Powell, J.,

concurring) (worrying that providing counsel for misdemeanor offenses would result in "problems of availability of counsel, of costs, and especially of intolerable delay in an already overburdened system"). Today, it is widely agreed that "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel." Barton, 62 Fla. L. Rev. at 1251 (internal quotations omitted). See also The Constitution Project National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009).

Insufficient funding and the growing number of cases requiring appointed counsel have led to excessive caseloads that cripple the ability of attorneys to provide vigorous representation for the criminal defendants who need them most. As one study reported, "The evidence is unambiguous and telling. Lawyers representing indigent defendants often have unmanageable caseloads that frequently run into the hundreds, far exceeding professional guidelines." Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062, 2064 (2000).

Prof. Hashimoto reviewed the stark statistics in public defenders offices across the country and found that "caseloads of indigent defense counsel still remain shockingly high." Hashimoto, 49 Wm. & Mary L. Rev. at 471-72. Often public defenders representing defendants charged with serious felonies represent up to 500 clients per year, despite professional guidelines

which provide that counsel handling felony cases should only take 150 cases per year. *Id.*

> In 2003, public defenders statewide in Minnesota handled more than 900 cases per attorney per year. In 2001, a trial staff of fifty-two lawyers at the public defender office in Hamilton County, Ohio, which encompasses much of the Cincinnati metropolitan area, handled 34,644 cases, an average of 666 cases per attorney. In Maryland in 2002, the public defender office, which had not increased in size in five years, reported that it would have to hire 300 attorneys just to meet national caseload standards. In 1996, staff attorneys at the Office of the Public Defender in Orange County, California maintained caseloads of 610 cases. In 2004 in Kentucky, public defenders handled an average 489 cases per lawyer.

Id. (footnotes omitted).

Prof. Barton provides the "jaw-dropping" anecdotes behind these statistics:

> In a case of mistaken identity, Henry Earl Clark of Dallas was charged with a drug offense in Tyler, Texas. After his arrest, it took six weeks in jail before he was assigned a lawyer, as he was too poor to afford one on his own. It took seven more weeks after the appointment of the lawyer, until the case was dismissed, for it to become obvious that the police had arrested the wrong man. . . . During this time, he lost his job and his car,

which was auctioned. After Clark was released, he spent several months in a homeless shelter.

. . . Sixteen-year-old Denise Lockett was retarded and pregnant. Her baby died when she delivered it in a toilet in her home in a South Georgia housing project. Although an autopsy found no indication that the baby's death had been caused by any intentional act, the prosecutor charged Lockett with first-degree murder. Her appointed lawyer had a contract to handle all the county's criminal cases, about 300 cases in a year, for a flat fee. He performed this work on top of that required by his private practice with paying clients. The lawyer conducted no investigation of the facts, introduced no evidence of his client's mental retardation or of the autopsy findings, and told her to plead guilty to manslaughter. She was sentenced to twenty years in prison. . . .

. . .

A defendant in Missoula, Montana, was jailed for nearly six months leading up to his trial. During the months before his trial, the defendant met with his court-appointed attorney just two times. That attorney did nothing to investigate the defendant's allegations that police obtained evidence against

> him during an illegal search. A second court-appointed lawyer subsequently had the case dismissed.[6]

As Prof. Barton explains, this grim reality has led even dedicated former criminal defense lawyers to suggest loosening the Sixth Amendment to recognize the necessity of indigent defense triage.[7]

The American Bar Association Standing Committee on Legal Aid and Indigent Defendants summarizes the criminal-defense situation as follows: "Forty years after *Gideon* v. *Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction. Funding for indigent defense services is shamefully inadequate. Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation."[8] Despite these findings the ABA, as *amici*, nonetheless advocate for further burdening the system by requiring appointed counsel in civil

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[6] Barton, 62 Fla. L. Rev. at 1254 (citing Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031 (2006).

[7] Citing John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 Val. U. L. Rev. 925 (2005).

[8] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, at v (2004).

contempt cases. See Brief of *Amicus Curiae* American Bar Association in Support of Petitioner.

Expanding the right to appointed counsel to include child support enforcement proceedings will only exacerbate the problems facing this overburdened system. Additional funding will not appear, especially given the harsh fiscal realities currently facing many state governments. Instead, requiring counsel in these cases will simply stretch overburdened resources even thinner.

The experience of states that currently provide appointed counsel in child support enforcement proceedings is telling. In New Jersey, the state supreme court has held that the constitution provides a right to appointed counsel for civil contemnors. See *Pasqua* v. *Council*, 186 N.J. 127 (2006). Unable to provide additional funding for state appointed counsel or to secure adequate pro bono services, the state in response *gave up trying to use civil contempt to enforce child support orders against low-income parents*. Now, these non-paying parents are simply released. See Brief for Senators Demint, Graham, and Rubio as *Amici Curiae* In Support Of Respondents, Appendix A at 8a.

Similarly, in Pennsylvania, the state supreme court has established that an indigent parent in a child support enforcement proceeding has a right to counsel if faced with imprisonment for nonpayment.

Yet Pennsylvania remains unable to provide counsel in these cases, despite the constitutional mandate.[9]

Moreover, it is not clear that appointed counsel in these cases would be particularly useful. As discussed *supra* at 4-8, the relative value of such counsel comes into question in light of the available scholarship.

And even those who disagree recognize that without additional funding – which has not been forthcoming from state or local governments – appointed counsel may be of limited effectiveness. Elizabeth Patterson as *amicus* for the petitioner says that the assistance of counsel in child support proceedings is crucial for preventing the improper detention of those who are unable to pay. See Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as *Amici Curiae* in Support of Petitioner. But Patterson has herself acknowledged that the "availability of appointed counsel standing alone does not ensure full and fair consideration of the obligor's ability to pay. Appointed counsels are often overburdened and unable to provide the needed level of representation. Researchers who observed child support contempt proceedings in several states reported, 'In many of the courtrooms we watched, these attorneys would call out their client's name as

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[9] See Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers, The Brennan Center for Justice, the National Legal Aid & Defender Association, The Southern Center for Human Rights, and the American Civil Liberties Union in Support of Petitioner at 28-29 n. 9.

the courtroom filled with cases, meeting the client for the first time just prior to the hearing.'"[10]

Despite acknowledging the financial limitations facing appointed counsel, Patterson nonetheless continues to advocate for expanding the right to appointed counsel, while also asserting that "adequate state resources [must] be devoted to assuring that representation is meaningful." *Id.*

This solution is unlikely at best. State governments have been unable to provide adequate funding to keep pace with the growth in the number of cases requiring appointed counsel. Examining indigent defense budgets at the state and local level, Prof. Hashimoto found that while the total number of cases has risen between 100 and 200 percent since 1982, budgets for indigent defense have increased only 50 to 75 percent. See Hashimoto, 49 Wm. & Mary L. Rev. 461, 486-87 (2007).

Deborah Rhode similarly points out that over the last two decades, "national spending on legal assistance has been cut by a third." Rhode, 12 Wash. U. J.L. & Pol'y 47, 48 (2003). Today, for civil legal aid, the federal government currently spends about $300 million. But "[r]ecent estimates suggest that well over ten times that amount – on the order of three to four

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[10] See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 139 (2008).

billion dollars – would be required to meet the civil legal needs of low-income Americans." *Id.* at 50.

As one scholar bluntly noted, "public defense is a zero-sum game. Whatever resources are added to one public defense client's defense will not be available to another. And significant additional public funds are simply not forthcoming to increase the public defense pie." John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 Val. U. L. Rev. 925, 926 (2005) (footnotes omitted).

Recognizing this reality, there is a compelling argument that the best way to preserve the promise of *Gideon* is to limit the right of court-appointed counsel to cases where it will have the greatest impact. Prof. Hashimoto explains that the empirical evidence suggests that the appointment of counsel in misdemeanor cases may not provide a significant benefit. As discussed above, Prof. Hashimoto has shown that *pro se* misdemeanor defendants in federal courts actually achieve more favorable outcomes than their represented counterparts. See *supra* at 4-6.

Yet despite the scarcity of attorney resources, and the relative ineffectiveness of appointed counsel in misdemeanor cases, "indigent defense systems force counsel to direct significant attention to low-level misdemeanor cases." Hashimoto, 49 Wm. & Mary L. Rev. at 464. But Prof. Hashimoto explains that "[b]ecause the empirical evidence indicates that counsel play a significantly less critical role in minor misdemeanor cases than they do in felony cases,

limiting appointment of counsel to felony and more serious misdemeanor cases could relieve pressure on indigent defense systems while violating neither the Sixth Amendment nor the spirit of *Gideon*." *Id.* at 489.

Therefore, "states should redirect resources now spent on such [low-level cases] to reduce indigent defender caseloads so that those who represent defendants charged with more serious crimes will have more time to spend on those cases." *Id.* at 464.

Overextending the limited resources available for indigent defendants by requiring appointed counsel in child support enforcement proceedings would only further undermine *Gideon*'s promise to provide effective representation for those who need it the most. As discussed above, given the nature of child support enforcement proceedings, there is little reason to think that the addition of appointed counsel for the contemnor father will improve the accuracy of these proceedings. The proceedings deal only with the straightforward factual issue of the contemnor father's ability to pay, and courts are well experienced with making these indigency determinations.

As respondents pointed out, in child support proceedings, "the evidence confirms that there is little need for lawyers because courts are carefully evaluating the merits." In a majority of cases (54 percent) judges decline to find the nonsupporting father in contempt. 80 percent held in contempt alleged no disability or injury limiting their ability to pay. "Judges

appear to be carefully sifting fathers who cannot pay from fathers who choose not to pay, instead of rubber-stamping findings of contempt." Respondent's Brief In Opposition To Certiorari at 37, n. 10 (citing certiorari-stage Brief *Amici Curiae* of Center for Family Policy & Practice et al. 17-20).

If appointed counsel do not definitively improve results in federal felony cases, or many state misdemeanor cases, it is unclear that appointing counsel for a contemnor father facing an unrepresented mother would add much value in a child enforcement proceeding, or increase the likelihood of a fair and accurate outcome. Rather, it would simply draw the scarce resources available for indigent defense away from those who need them the most. As Prof. Hashimoto argues, "[i]n a world of limited indigent defense resources, states must make a choice: They can provide minimal representation to all indigent defendants, or they can . . . focus those resources on the representation of defendants facing charges of greatest severity. . . ." Hashimoto, 49 Wm. & Mary L. Rev. at 513. "[S]tates should focus their indigent defense resources on those who need them most-defendants who have a constitutional right to counsel, who gain the greatest benefit from counsel's assistance, and who face the gravest consequences in the absence of forceful, focused, and skilled representation." *Id.*

Given the fiscal constraints facing states across the country, additional funding to support an expansion of the right to appointed counsel will not suddenly materialize if this Court extends *Gideon* to civil

contempt proceedings. And such an extension is not an effective way to allocate scarce state resources when it is of questionable (if any) benefit to the contemnor.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the South Carolina Supreme Court.

February 15, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

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13

No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF CENTER FOR FAMILY POLICY AND PRACTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. INCARCERATION OF INDIGENT PARENTS FOR NONPAYMENT OF CHILD SUPPORT DOES NOT PROMOTE THE GOALS OF CHILD-SUPPORT ENFORCEMENT 4

A. Earlier Child Support Reforms Targeted "Deadbeat Dads"—Those With The Ability To Pay, But Unwilling To Do So—In Order To Improve The Economic Condition Of Poor Children And To Recoup Government Welfare Costs 4

B. The Current Child Support System Does Not Adequately Protect Against Poor Noncustodial Parents Being Ordered To Pay More Support Than They Can Afford 10

1. Imputing of income 11

2. Reimbursement of costs 13

3. Failure to provide downward adjustments 14

TABLE OF CONTENTS—continued

Page

C. The Vast Majority Of Child Support Debt In The United States Is Owed By Destitute Noncustodial Parents Who Lack The Means To Pay 16

D. The Poorest Noncustodial Parents Are Most Likely To Face Incarceration For Nonpayment Through The Civil Contempt Process, Even Though Such Harsh Enforcement Measures Were Developed With "Deadbeat Dads" In Mind 19

II. RECOGNITION OF A RIGHT TO COUNSEL IN CIVIL CONTEMPT PROCEEDINGS THAT COULD RESULT IN INCARCERATION WOULD NOT BURDEN THE EFFECTIVENESS OF THE CHILD SUPPORT ENFORCEMENT SYSTEM 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

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STATEMENT OF INTEREST[1]

The Center for Family Policy and Practice ("Center") is a nonprofit public policy organization that focuses on the nationwide impact of national and state welfare programs, fatherhood initiatives, and child support policy on parents and their children who frequently navigate the family and social welfare systems without legal representation. The Center was established in 1995 with the help of the Ford Foundation under the Strengthening Fragile Families Initiative. Recognizing the limited advocacy and policy analysis of these issues from the perspective of very low-income men of color, the Center's mission has been to concentrate on the perspective of these individuals, while also providing public education and technical assistance on the challenges and barriers unique to these individuals and their families.

SUMMARY OF ARGUMENT

Petitioner Michael Turner's experience is not an anomaly. Across the United States, destitute, noncustodial parents are incarcerated for failing to meet child support obligations they have no means to pay. This is despite the fact that child support law

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief, except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

and policy is targeted elsewhere—at so-called "deadbeat dads" who have the ability to pay but choose not to do so.

Whatever their effectiveness in securing payments from noncustodial parents with the means to pay, the inflexible application of child support collection and enforcement measures has resulted in a disproportionate and destructive impact on low- and no-income noncustodial parents and their families. These measures are designed to ensure that child support payments are "automatic and inescapable"—no matter the circumstance. However, the vast majority of child support owed in the United States is owed by noncustodial parents who live in poverty. These parents lack the means to pay their child support debt, yet they are subject to the full panoply of enforcement measures, including "civil" incarceration for nonpayment of support.

Low-income noncustodial parents who lack the ability to pay their child support debts in full are more likely to face incarceration than are noncustodial parents who have the means to pay child support and refuse to do so. This is because more conventional and less severe enforcement measures (such as wage garnishment) are effective in securing support from those with the means to pay.

The end result is that jails across the United States house large numbers of low- and no-income parents who have been incarcerated (largely through civil contempt processes) for nonpayment of child support. For example, in South Carolina, where Michael Turner was incarcerated, surveys suggest that thirteen to sixteen percent of the county jail

population in South Carolina is made up of child support obligors. Recognition of a right to counsel in these circumstances would at least enable many low-income and no-income child support obligors to effectively assert their defense, such as an inability to comply, in order to avoid incarceration.

Finally, recognizing a right to counsel for indigent noncustodial parents in civil contempt proceedings that could result in incarceration will not undermine the child support enforcement system. The appointment of counsel in such circumstances appropriately recognizes the punitive nature of incarceration when the defendant lacks the ability to pay his or her full support obligations. There is also growing recognition that counsel in such cases can help prevent unjustified incarcerations that actually undermine the goals of the child support system by preventing noncustodial parents from earning income immediately as well as damaging their long-term employment prospects upon release.

ARGUMENT

I. INCARCERATION OF INDIGENT PARENTS FOR NONPAYMENT OF CHILD SUPPORT DOES NOT PROMOTE THE GOALS OF CHILD-SUPPORT ENFORCEMENT.

A. Earlier Child Support Reforms Targeted "Deadbeat Dads"—Those With The Ability To Pay, But Unwilling To Do So—In Order To Improve The Economic Condition Of Poor Children And To Recoup Government Welfare Costs.

In 1996, Congress passed sweeping reforms of the federal welfare and child support enforcement systems. The new welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[2], ended Aid to Families with Dependant Children (AFDC)[3], the then-existing federal welfare entitlement program, and replaced it with Temporary Assistance to Needy Families (TANF)[4], a federal block grant program. Ron Haskins & Rebecca M. Blank, *Welfare Reform: An Agenda for Reauthorization*, THE NEW WORLD OF WELFARE 3-13 (Rebecca M. Blank & Ron Haskins eds., 2001). TANF replaced the AFDC entitlement program, imposed strict work requirements on

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[2] Pub.L. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601-617 (2006))

[3] Social Security Act, Pub.L. 74-271 §§ 301-303, 49 Stat. at 625-26 (1935)

[4] PRWORA, Pub.L. 104-193 §§ 101-116, 110 Stat. at 2110-85 (1996).

recipients in exchange for government assistance, established time limits on receipt of welfare benefits, and required States to sanction those who do not engage in work or work-related activities. *Id.* The unmistakable message underlying PRWORA was that poor mothers must go to work to support their children. To achieve this welfare-to-work goal, the law provided short-term cash benefits, employment-related services to address the labor market barriers poor mothers experience, and supports (such as child care assistance) to enhance the likelihood that they would succeed in the workplace. *Id.*

The child support enforcement amendments in the PRWORA were as extensive and far-reaching as the welfare reforms. The primary purpose of these reforms was to improve the operation of child support systems so that more money would be collected from noncustodial fathers to help single mothers moving from welfare to work. The reforms also advanced the goal of welfare cost recovery, the government practice of seeking reimbursement of welfare costs through child support enforcement.[5] Central features of the PRWORA included enhanced procedures for establishing paternity in nonmarital births, implementation of a national directory of new hires that would be used to locate nonpayers, and streamlined administrative procedures. *Id.* at 252-56. Another significant systemic change was

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[5] This practice was introduced in the landmark Child Support Act of 1974, which established the federal Office of Child Support Enforcement. *See* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 253 (2000).

implementation of mass case processing in lieu of judicial and quasi-judicial individualized proceedings. *Id.* Overall, the child support system became more automated and, particularly with respect to enforcement methods, more stringent and punitive. *Id.* As some described it at the time, "the new child support provisions are designed to ensure that child support payments are 'automatic and inescapable.'"[6]

Much attention was focused on the economic plight of single-mother families and the failure of absent fathers to provide for their children. *Id.* at 252. The figures were sobering. Nearly half of all single-mother families were living in poverty. *Id.* About the same number relied on welfare to make ends meet. *Id.* They received almost no financial assistance from noncustodial fathers. Most fathers did not make any child support payments whatsoever and, for those who did, the amounts were meager. *Id.* Even more troubling was data regarding child support receipt in single-parent households receiving welfare. In 1994, when the proposed welfare reform measures were being debated, only 12.5% of single-parent families receiving welfare were receiving child support. *Id.* It was believed that the availability of child support from noncustodial fathers would raise some families above the poverty threshold.

Against this backdrop, the child support reforms of 1996 were propelled by widespread societal

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[6] *Id.* at 256 (*quoting* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538 (1996)).

hostility toward "deadbeat dads," a term that was applied indiscriminately to all noncustodial fathers who were delinquent on their payments. Brito, *supra*, at 263-64. The public viewed nonpaying fathers as men who could afford to pay child support but flagrantly chose not to, depriving their children of desperately needed economic support. *Id.* State agencies went so far as to post "wanted ads" of fathers who failed to support their children. *See* Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1001 (2005-2006). Subsequent media coverage of these "deadbeat" dads fueled public outrage, particularly because the popular image conveyed was that of a father who "enjoy[ed] a comfortable lifestyle" and yet shirked his child support obligation while his children lived in abject poverty. *Id.* This image was fairly applied to the many well-to-do fathers whose children were suffering economically, but it did not take account of the twenty-six percent of noncustodial fathers who are poor themselves.[7]

When considering the reform proposals, policymakers gave little thought to fathers with limited financial means or to how to help them meet their financial obligations to their children. *Id.* at 427. These poor fathers, characterized by some

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[7] *See* Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 420, 422 (2001) (examining 1997 child support data revealing that twenty-six percent of noncustodial fathers (2.8 million) were categorized as poor, while forty-two percent (4.5 million) of noncustodial fathers were able to pay support but did not).

researchers as either "dead broke"[8] or as "turnips,"[9] have limited ability to provide economic support to their noncustodial children. One empirical study found that twenty-three percent of noncustodial fathers are indeed "unable nonpayers."[10] About a quarter of poor fathers who do not pay child support are incarcerated and the remainder experience some or all of the following barriers to employment: limited education; limited work experience; health problems; criminal records; transportation barriers; lack of phone service; and housing instability. Sorensen, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, *supra*, at 424-26. The researchers' conclusion—that it would be futile to pursue child support payments from these impoverished fathers—has been borne out. Jocelyn Elise Crowley, The Politics of Child Support in America at 164 (2003) (citing Mincy, *supra*, at 44-510). "In other words, nonresident fathers are rarely poor *and* paying child support (three percent)." Sorensen, *Getting to Know*

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[8] Maldonado, *supra*, at 1003.

[9] Young, uneducated, never-married noncustodial parents who lack income to pay child support are called "turnips" after the phrase "You can't get blood from a turnip." Ronald Mincy & Elaine Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL'Y ANAL. & MGMT. 44, 45 (1998).

[10] Sorensen, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, *supra*, at 423. Another study, reviewing data from the 1990 Survey of Income and Program Participation conducted by U.S. Census Bureau, estimated that between 16 and 33 percent of noncustodial fathers are unable nonpayers. Mincy, *supra*, at 47.

Poor Fathers Who Do Not Pay Child Support, *supra*, at 423.

Unnecessarily harsh application of child support laws do not provide assistance in gaining job skills and employment so that these "dead broke" dads are better able to support their children. Rather, harsh enforcement places the poorest fathers in an economically untenable position. It sets child support orders at levels that exceed their capacity to pay and then later punishes them for shirking their responsibilities when they are inevitably delinquent.[11]

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[11] Although low-income fathers and mothers encounter similar labor market barriers, fathers have not been provided with as many opportunities to participate in job placement, training and education programs. Elaine Sorensen & Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?*, THE URBAN INSTITUTE (April 2001) *available at* http://www.urban.org/url.cfm?id=310334. "In 1996, for example, only 6 percent of the fathers received job search assistance, compared with 11 percent of the mothers. The gap is even more striking for training/education classes, with only 4 percent of the fathers engaging in such activities, compared with 19 percent of the mothers." *Id.* at 3. For a discussion of the Parents' Fair Share program, a small-scale demonstration project implemented in the 1990s to improve fathers' ability to pay support, *see* Earl S. Johnson & Fred Doolittle, *Low-Income Parents and the Parents' Fair Share Program: An Early Qualitative Look at Improving the Ability and Desire of Low-Income Noncustodial Parents to Pay Child Support*, FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 253-301 (Irwin Garfinkel et al., eds. 1998).

B. The Current Child Support System Does Not Adequately Protect Against Poor Noncustodial Parents Being Ordered To Pay More Support Than They Can Afford.

Reforms to the child support system have resulted in ever-larger numbers of noncustodial parents who are under an order of support. *See* Elaine Sorensen, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANAL. & MGMT. 604, 604 (2010). This development is consistent with the widely held view and expectation that all parents, including poor parents, should provide for their children. Recognizing the precarious economic situation that poor noncustodial parents are in, most state child support guidelines include alternative provisions for low-income payers and/or a self-support reserve.[12] Unfortunately, the existence of these provisions does not solve the problem. For the reasons discussed below, poor noncustodial parents are often ordered to pay support in amounts greater than they can afford.

Despite the existence of alternative "low-income parent" rules and the self-support reserve, the amount of child support low- and no-income fathers

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[12] Most states include a self-support reserve in their guidelines. Paul Legler, *Low Income Fathers and Child Support: Starting Off on the Right Track*, POLICY STUDIES 11 (Jan. 30, 2003) *available at* http://www.aecf.org/upload/publicationfiles/starting%20off.pdf. It operates to set aside a portion of the payer's income to cover minimal, basic living expenses. *Id.* The child support award is then calculated based on the remaining income. *Id.*

are actually ordered to pay often bears no relationship to their actual income and far exceeds their ability to pay. This mismatch between the award amount and low-income fathers' financial means results from several systemic practices, including "imputing income" when setting support orders; adding additional costs that were incurred by the State before the initial child support order was established; and failing to modify existing orders downward when circumstances warrant.[13]

1. Imputing of income

The child support guidelines used by States to set awards base child support on parents' earned income. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS § 2.03(a) (rev. ed. 2006). Often, however, the child support order of low- and no-income fathers is established based on imputed earnings rather than actual earnings. Rebecca May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, CENTER FOR FAMILY POLICY & PRACTICE 10-11 (June 2004) *available at*

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[13] Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 108-115 (2008-2009). Not surprisingly, since the 1990s, child support orders have been regressive, with lower-income fathers being ordered to pay a much higher percentage of their income than higher-income fathers. *See* Irwin Garfinkel, Daniel R. Meyer, & Sara S. McLanahan, *A Brief History of Child Support Policies in the United States*, FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 14, 22-23 (Irwin Garfinkel et al. eds. 1998) (28 percent versus 10 percent).

http://www.cffpp.org/publications/effect_child.html. Income is typically imputed when the noncustodial father does not appear for the hearing and the court enters a default order. *Id.* In imputing income to the noncustodial father, the court makes an assumption about how much a father earns or should earn.[14] Generally, the court will impute to the obligor the ability to earn the minimum wage[15] and assumes a full-time, 40-hour week. However, assuming a minimum wage and 40-hour work-week overestimates the income of the low-income parents, who lack stable employment and often work less than 40 hours a week.[16]

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[14] Patterson, *supra*, at 108. Many states have developed alternate child support rules and formulas for common child support situations that raise special concerns, including cases involving low-income payers. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS §4.07(c) (rev. ed. 2006). State guidelines have taken three general approaches. Under the first approach, typically applied in situations where the payer falls below the poverty threshold, the guidelines set a presumptive (and rebuttable) award of $50 per month for each child. *Id.* at §407(c)(i). The second approach sets a minimum child support award (usually falling somewhere between $20 to $50). *Id.* at §407(c)(ii). The award is mandatory and cannot be adjusted downward. *Id.* Under the third approach, the guidelines do not establish a presumptive child support amount and leave the amount to the discretion of the judge. *Id.* at §4.07(c)(iii).

[15] Patterson, *supra*, at 108.

[16] May, *supra*, at 10-11; Jessica Pearson & Esther Ann Griswold, *New Approaches to Child Support Arrears*, 59 POL'Y & PRAC. OF PUB. HUMAN SERVS., 33 (2001), *available at* http://www.ancpr.org/new-approachestoschildsupport_.htm.

2. Reimbursement of costs

Fathers of children receiving welfare are often required to reimburse the State for additional welfare costs that were incurred by the State before the initial child support order was even established. May *supra*, at 11. For example, the court may require the father to reimburse the costs of welfare benefits previously paid to the family. *Id.* Medicaid childbirth costs may be added to the initial order as well. *Id.*; *see also* Garfinkel, *supra*, at 22-23. Additional add-ons include fees for paternity testing, litigation costs, and interest and penalties.[17] As a result, at the time the order is set, it is "front-loaded" with welfare costs (sometimes in the thousands of dollars) that are retroactively imposed on noncustodial fathers. *Id.* at 6-7. Coupled with imputed earnings, these practices result in child support orders that often exceed fifty percent of reported earnings among low-income fathers[18] and

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[17] Vicki Turetsky, *Realistic Child Support Policies for Low Income Fathers*, CENTER FOR LAW AND SOCIAL POLICY 7 (March 2000), *available at* www.clasp.org/admin/site/publications/files/0061.pdf.

[18] Elaine Sorensen, et al., *Assessing Child Support Arrears in Nine Large States and the Nation*, THE URBAN INSTITUTE 77 (July 2007) *available at* http://www.urban.org/url.cfm?id=1001242. "In 1997, a noncustodial father of two with earnings of $500-700 per month could plausibly have faced a monthly support order equal to 40+ percent of his income in nine states, and 20-39 percent of his income in another 20." Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. POL'Y ANAL. & MGMT. 89, 92 (2001).

burden them with an unmanageable child support arrearage from the outset.

3. Failure to provide downward adjustments

If there is a downward adjustment in the amount of the child support order, it must generally be pursued by the obligor.[19] Poor noncustodial fathers are unlikely to have the skills to navigate a downward adjustment to their order to reflect detrimental changes in their financial circumstances, such as a job loss or a decline in earnings. May, *supra*, at 11-12. Although the employment status of low-income noncustodial fathers is often unstable and changeable, their child support orders are typically not modified to reflect their reduced earnings. *Id.* Poor fathers lack access to counsel, who could seek modification on their behalf when their earnings decline. *Id.* They are also unlikely to file a *pro se* petition in court seeking a downward modification. Patterson, *Civil Contempt and the Indigent Child Support Obligor*, *supra*, at 14. A recent study examining the experience of low-income families with the child support system revealed that many poor fathers lack awareness of the child support system

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[19] State child support guidelines allow parents to seek a modification of their child support order upon a showing that there has been a change in their circumstances that warrant an adjustment. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS §5.01 (rev. ed. 2006). The obligor's involuntary unemployment or underemployment typically qualifies as the type of substantial change in circumstances that justifies a decrease in the amount of the child support order. *Id.*

and related court processes. Many fathers did not even know that they could seek a downward modification of their child support order or what steps to follow to obtain a reduction in the award.[20]

Nor can poor fathers look to state child support personnel to update their orders when circumstances warrant, even though state agencies have the option to do so.[21] Where downward modifications of child support awards are concerned, the States' fiscal interests are diametrically opposed to the economic interests of noncustodial fathers whose children receive welfare benefits. States have an incentive to not update orders when the father's income decreases because it results in a potential loss of revenue for the State. Garfinkel, *supra*, at 23. Empirical data assessing modification practices in several States confirm that child support offices tend not to pursue modifications in such cases where the child support order would be reduced.[22]

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[20] Waller, *supra*, at 106. Even the fathers who sought modifications at times of earnings loss reported difficulties. *Id.*

[21] *Id.* Unlike prior law, child support agencies are no longer required to conduct periodic reviews and adjustments of child support orders. If requested by either the parent or the state (in the case of TANF cases), however, the agency must undertake this task at least once every three years. *Id.*

[22] *Id.* A State's interest in recouping welfare expenditures is in tension with its goal of improving the economic wellbeing of children living in poverty. Mothers are required to assign their rights to collect child support to the state as reimbursement for welfare benefits. Because most States use the entire monthly support payment to recoup welfare expenditures, the child support collected does not enhance the family's living standard.

C. The Vast Majority Of Child Support Debt In The United States Is Owed By Destitute Noncustodial Parents Who Lack The Means To Pay.

As noted above, the child support system has not realistically taken account of the financial and work opportunities of a large number of nonpaying parents who owe support. Most of the fathers who do not pay child support payments are poor and unable to find

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See Waller, *supra*, at 91. About a third of the States pass through $50 of the collected child support to the child's family. *Id.* "In 2004, states collected approximately $635 million in child support on behalf of TANF families and distributed about 27 percent of it to TANF families, keeping the rest to reimburse the federal and state governments for welfare costs." Laura Wheaton & Elaine Sorensen, *The Potential Impact of Increasing Child Support Payments to TANF Families*, THE URBAN INSTITUTE 1 (Jan. 2008), *available at* http://www.urban.org/url.cfm?id=411595. States could give families on welfare all the child support they collect through the assignment process. Doing so would remove many more families from poverty. *Id.* Even fathers who later reunite with their family are not shielded from state efforts to collect child support. In these cases, the child welfare system essentially pursues state-owed child support from low-income fathers who are residing with their children in intact families, thus reducing the economic resources available to the family and privileging recoupment of state welfare expenditures. *See* Turetsky, *Realistic Child Support Policies for Low Income Fathers*, *supra*, at 9; *see also* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1057-1063 (2007) (describing *Harvey v. Marshall*, 884 A.2d 1171 (Md. 2005) in which the noncustodial father gained custody of his four children and the state continued to pursue ten thousand dollars in arrearages that accumulated prior to the change in custody).

jobs that would enable them to pay child support. *See* Sorensen, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, *supra*, at 422. About twenty-six percent of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) does not pay any child support. *Id.* These fathers earned an average of $5,627. *Id.* at 424. Further, one study found that sixty percent of poor fathers who do not pay child support are racial and ethnic minorities, and twenty-nine percent were institutionalized (mostly in prison) at the time of the interview. *Id.* at 423. Only forty-three percent of the men not in prison were currently working, and those employed at all in 1996 worked an average of just 29 weeks and earned $5,627 that year. *Id.* Their barriers to employment[23] were also considerable: forty-three percent were high-school dropouts, thirty-nine percent had a health problem, and thirty-two percent had not worked in three years. *Id.* Overall, job prospects are not promising for men with already

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[23] Welfare program administrators classify certain welfare recipients as "hard to employ" because of characteristics which act as "barriers to employment." Barriers to employment include: limited education, limited work skills, addictions, criminal records, and physical and mental health problems. *See, e.g.*, Pamela J. Loprest, et al., *TANF Policies For The Hard To Employ: Understanding State Approaches And Future Directions* THE URBAN INSTITUTE 8-9 (July 2007), *available at* http://www.urban.org/url.cfm?id=411501.

weak attachment to the labor force and other significant barriers to employment.[24]

Low-income and even no-income parents are responsible for the greatest portion of unpaid child support, according to the U.S. Office of Child Support Enforcement (OCSE). Of the more than $70 billion in child support debt nationally, seventy percent of all arrears due to the government (as reimbursement for welfare expenditures) are owed by noncustodial parents who have no quarterly earnings or earn less than $10,000 annually.[25] Only four percent of child support arrears are held by noncustodial parents with more than $40,000 in annual income.[26] The problem is nationwide; the child support caseloads in every State include very low-income fathers who have accumulated enormous arrearages and who have virtually no prospect of ever satisfying the debt. May, *supra*, at 9. The goal of recouping welfare expenditures incentivizes the State to aggressively pursue child support collections from the very poorest parents, rather than from middle- or upper-income parents, who do not have children in the welfare

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[24] Dan Bloom, et. al., *Four Strategies to Overcome Barriers to Employment: An Introduction to the Enhanced Services for the Hard-to-Employ Demonstration and Evaluation Project, MDCR 2-3 (October 2007) available at* http://www.mdcr.org/publications/469/overview.html.

[25] *Arrears Leveraging Pilot Project: Outcomes Achieved & Lessons Learned*, FAMILY WELFARE RESEARCH & TRAINING GROUP (March 2005) *available at* www.familywelfare.umaryland.edu/reports/debtleveraging.pdf.

[26] Sorenson, *Assessing Child Support Arrears in Nine Large States and the Nation*, *supra*, at 23.

caseload.[37] For these poor fathers, it is virtually inevitable that they will experience the full brunt of the child support enforcement system, including penalties, sanctions, and potentially even incarceration. May, *supra*, at 9.

D. The Poorest Noncustodial Parents Are Most Likely To Face Incarceration For Nonpayment Through The Civil Contempt Process, Even Though Such Harsh Enforcement Measures Were Developed With "Deadbeat Dads" In Mind.

The accumulation of unrealistic and excessive child support debts results in large part from subjecting impoverished noncustodial parents to an "automatic and inescapable" child support system that has reimbursement of welfare benefits as its primary focus and far too often does not account for the parents' inability to pay. The low-income noncustodial parent who lacks attorney

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[37] *Id.* The State's interest in maximizing its revenue through pursuit of collections from poor fathers is also fueled by the federal government's incentive payment system. Hatcher, *supra*, at 1050-51. Under this system, State's have the potential to win financial awards based on their performance in several areas of child support enforcement. *Id.* Significantly, the program provides larger cash payments for child support collections from the State's welfare caseload as compared to the non-welfare caseload. *Id.* The proceeds from welfare cost recovery together with potential extra cash payments from the federal government create a powerful incentive for states to pursue collections from poor fathers, even when to do so is tantamount to trying to get blood from a turnip.

representation frequently experiences the child support system as a virtually unstoppable chain of events that leads inevitably to unfathomable levels of debt that they have no hope of ever paying off. *C.f. In re Gault*, 387 U.S. 1, 26 (1967) (a low-income noncustodial parent requires counsel "to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether [the parent-debtor] has a defense").

It is therefore not surprising that many low-income noncustodial parents experience the full weight of the child support enforcement process.

The child support system has developed a broad arsenal of enforcement strategies. According to the federal Office of Child Support Enforcement, their automated enforcement tools are very effective when used with the parents in their caseload who are regularly employed or have assets. Vicki Turetsky, *Commissioners Voice: 'Bubble Chart' Mirrors Child Support Work Nationwide*, CHILD SUPPORT REPORT, Nov. 2010, at 2, *available at* http://www.acf.hhs.gov/programs/cse/pubs/2010/csr/csr1011.pdf. Automatic withholding of child support payments from employer payrolls accounts for seventy percent of all child support collections. *Id.* ("[T]raditional enforcement tools have been less effective for the approximately 25 percent of parents who owe child support but have a limited ability to pay."). Child support is also secured from able-nonpayers through a range of alternative mechanisms, such as intercepting federal and state income tax refunds, seizing bank account balances, restricting or revoking occupational, professional and drivers' licenses, and placing a lien on property. *Id.*

However, these conventional collection methods are not effective in collecting past due child support from noncustodial parents who lack stable, consistent employment and financial assets. *Id.* Indeed, utilizing these less severe sanctions with dead broke noncustodial parents would be futile. Wage assignment will not work if the parent is unemployed. Intercepting tax refunds will not work if the parent is not due a tax refund. Seizing bank balances will not work if the parent does not have assets squirreled away in an account. Denying a passport will not work if the parent lacks the resources to travel outside the country. Having failed to collect support by these traditional methods, the child support system often turns to more aggressive enforcement measures when pursuing collections from indigent parents. Though such tools were established to collect unpaid support from deadbeat dads—those able but unwilling to pay—it is the low-income parent who most likely faces the threat of incarceration through the civil contempt process. Consequently, the harshest enforcement sanctions tend to have the greatest impact on the men with the least capacity to pay child support.

The Center for Family Policy and Practice ("Center"), which has been studying the challenges and barriers faced by low-income fathers since 1995, examined the intersection of child support and incarceration (civil contempt and criminal charges for non-payment of child support) in several publications. In its studies of this issue, the Center found that in most States, there were reports of civil contempt arrests and incarcerations for nonpayment of child support. May, *supra*, at 40. Notably, civil contempt

arrests and incarceration outnumber criminal nonsupport arrests in many jurisdictions. *Id.* Some jurisdictions, such as Marion County, Indiana, routinely rely on civil enforcement. In that county, it is "reported that out of 80,000 to 100,000 open child support cases each year, about 3%, or 2,400 to 3,300, result in incarceration for nonpayment. Roughly 15-20 of these are criminal charges, and the rest are civil contempt." May, *supra*, at 16. The Center's studies examining data at the local level in Wisconsin confirmed that the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay. The study revealed that in Madison and Milwaukee, Wisconsin there is a higher rate of arrests for nonpayment of child support for low-income minority parents than for other parents.[28] This is the case even though in Wisconsin, as in other States, inability to pay is a defense to civil contempt. *See Balaam v. Balaam*, 52 Wis. 2d 20, 29, 187 N.W.2d 867, 872 (1971).

In Dane County, which surrounds and includes the city of Madison, Wisconsin, there were 2,899 bookings to jail for nonpayment of child support (felony, misdemeanor, and civil contempt) from January 2000 to August 2003. Of these, more than 1,400 or forty-eight percent were African-American and fifty percent were white. By comparison, the

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[28] May, *supra*, at 14-15 (the data in this study groups together felony, misdemeanor and civil contempt proceedings for nonpayment of child support).

African-American population of the county as a whole in 2000 was only four percent of the total population.

In Milwaukee County, a similar pattern is evident in the county's records. From April 1999 to April 2001, over 6,200 people who were booked in the county jail had nonpayment of child support listed as one of their offenses. *Id.*

II. RECOGNITION OF A RIGHT TO COUNSEL IN CIVIL CONTEMPT PROCEEDINGS THAT COULD RESULT IN INCARCERATION WOULD NOT BURDEN THE EFFECTIVENESS OF THE CHILD SUPPORT ENFORCEMENT SYSTEM

Appointing counsel to represent poor noncustodial fathers like Michael Turner in civil contempt proceedings where they face incarceration will not frustrate the child support enforcement system's important goal of obtaining economic support for children. The practice of repeated civil incarcerations of fathers like Michael Turner, whose indigence prevents them from paying their child support debts, is a wholly ineffectual way to collect child support. Turner's jail terms undoubtedly do far more to hinder his efforts to find stable employment than they do to provide economic security to his children. Not surprisingly, it was only on the one occasion when Turner was assisted by volunteer *pro bono* counsel at his civil contempt hearing that the proceeding addressed one of the barriers preventing Turner from maintaining stable employment. Brief of the Petitioner-Appellant at 15, n.10, *Turner v. Rogers*, No. 10-10 (U.S. January 4, 2011). His experience underscores how the provision of counsel

will likely do more to advance the goals of the child support system than will recurring jail sentences.

Turner's experience with the child support system is all too common. Other poor noncustodial fathers report similar dystopian experiences. A noncustodial father who participated in one study focus group explained: "I'm just tired of getting locked up every so often, every eight months or so. I don't have no bad record at all. But I keep getting locked up or child support, that's the main thing." Waller, *supra*, at 105. Absent appointed counsel to advocate on behalf of these "dead broke" fathers, they will far too often remain trapped in a seemingly inescapable child support enforcement loop.

These types of incarcerations of indigent noncustodial fathers undermine child support program goals. Most fundamentally, few obligors will generate income while incarcerated,[29] and incarceration may have a deleterious effect on their employment prospects upon release. Thus incarceration will further disable them from paying the required support.[30]

In addition, there is growing recognition that the child support system's goals are well served if

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[29] Some child support contemnors are able to engage in compensated work release while incarcerated.

[30] There are reported cases in which incarceration caused contemnors to lose jobs from which wage withholding was providing or could have provided some level of support. *See, e.g., Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

appointed counsel prevents incarceration of indigent fathers by mounting an "inability to pay" defense. The child support field itself has come to recognize that the accumulation of large arrearages by low-income fathers is counterproductive to program goals. The Commissioner of the federal Office of Child Support Enforcement acknowledges that for this population the "growing body of research suggests that reduced orders and debt balances can improve employment and child support outcomes." Turetsky, *Commissioners Voice: 'Bubble Chart' Mirrors Child Support Work Nationwide, supra* at 2. The federal government now urges state child support programs to examine the underlying reasons fathers are not paying child support and to provide job-related support and services to poor fathers to help them meet their support obligations. *Id.* The preference for jobs (not jail) for indigent non-payers has slowly taken root within the mindset of the child support community over the last decade. This new thinking has not yet transformed how child support systems operate nationwide. For the most part, the systemic and automated practices that contributed to Tuner's multiple incarcerations remain the status quo. Understandably, implementing policy changes in a large and complex federal-state bureaucracy like the child support enforcement system will take time and resources. Nonetheless, demonstration projects, pilot programs and reforms at the federal, state and local level are taking place on several fronts.

First, States and localities are taking a close look at the large arrearages that have built up for low-income fathers. *See* Sorensen, *Assessing Child Support Arrears in Nine Large States and the Nation*,

supra, at 10. There is growing acknowledgement in the field that, as a practical matter, low-income fathers will never be able to pay the enormous debts they have accumulated and that, because of this, the very existence of the debt can discourage some fathers from even trying to repay it. Indeed, "the federal Office of Child Support Enforcement recently reissued a policy statement clearly stating that States have the authority to compromise unpaid welfare arrears owed to the government." Turetsky, *Realistic Child Support Policies for Low Income Fathers*, *supra*, at 9 (citing HHS/OCSE, PIQ-89-2 (Feb. 14, 1989); PIQ-99-03 (March 22, 1999)). Some of the methods States use to manage uncollectible arrears include amnesty (debt forgiveness) programs for state-owed arrearages and the automatic suspension of orders when the father is in jail or participating in a job program. *Id.*

Second, there is a growing recognition that the arrearage problem is best handled through prevention. States are thus reconsidering the practice of routinely imputing income, setting large retroactive orders based on welfare debt and other costs that bear no relationship to the father's ability to pay, and keeping orders current by implementing procedures to facilitate prompt review and adjustment of orders when appropriate. U.S. Office of Child Support Enforcement, Administration for Children and Families, Project to Avoid Increasing Delinquencies (July 2008) available at www.acf.hhs.gov/programs/cse/pol/DCL/2007/dcl-07-17a.pdf.

Third, there is widespread understanding that many low-income fathers who want to pay support

are unable to do so simply because of obstacles to full participation in the labor market. Child support enforcement efforts must be coupled with measures designed to improve the employment prospects and earnings of poor fathers.[31] This approach is reflected in President Barack Obama's agenda for strengthening families, the Fatherhood, Marriage and Family Innovation Fund. The proposal, included in the administration's FY2011 budget proposal, would establish a new $500 million dollar fund to provide grants to States to conduct and evaluate "comprehensive responsible fatherhood initiatives" and "comprehensive demonstrations to improve child and family outcomes in low-income families with serious barriers to self-sufficiency."[32] While there exist state and local level pilot programs that provide comprehensive employment and other supportive services to low-income noncustodial parents,[33] the

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[31] There is considerable evidence that even if the child support system were effective in securing payments from poor fathers, the amounts would not be sufficient to lift their children out of poverty. No matter how aggressive and relentless the enforcement efforts, the reality is that these poor fathers have limited and unstable income. *See* Jane Waldfogel, *The Role of Family Policies in Antipoverty Policy*, CHANGING POVERTY, CHANGING POLICIES 242, 253-54 (Maria Cancian & Sheldon Danziger, eds. 2009).

[32] U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement, *The Fatherhood, Marriage and Family Innovation Fund* (2010), *available at* http://www.acf.hhs.gov/programs/csc/pubs/2010/innovation_fund_one_pager.html.

[33] For example, in 2006 the New York legislature enacted the Strengthening Families Through Stronger Fathers Initiative, which, among other things, funded a three-year pilot program to

Obama administration's Fatherhood, Marriage and Family Innovation Fund would be the first such program at the federal level.

Like these other measures, appointment of counsel to indigent noncustodial parents in civil contempt proceedings that could lead to incarceration would serve to rationalize the child-support enforcement process by ensuring that obligors are incarcerated only when they truly have the ability to pay and that alternative steps are taken in cases of indigent obligors.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

January 11, 2011

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provide employment services to low-income noncustodial parents. *See* Tess Tannehill, et al., *Strengthening Families Through Stronger Fathers Initiative: Process Evaluation Report*, THE URBAN INSTITUTE 2-3 (July 2009), *available at* http://www.urban.org/url.cfm?ID=1001412.

AMICUS CURIAE BRIEF

8

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In the

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The Court Has Already Recognized That Indigent Defendants In A Civil Action Have A Right To Appointed Counsel When Loss Of Liberty Is At Stake; Resolving This Case In Favor Of Mr. Turner's Position Will Clarify The Standard To The Minority States 9

A. "Fundamental Fairness" Requires Counsel To Be Made Available Absent The Defendant's Specific Waiver of the Right In Any Proceeding That Results In Loss Of Liberty 10

B. Each Of The Minority States Has Either Barred Any Right To Appointed Counsel In Civil Contempt Actions Entirely Or Has Established A Case-By-Case Procedure That Effectively Bars The Right To Appointed Counsel 12

C. It Is Illogical For The Minority States To Require Counsel For Defendants Charged With Misdemeanors Per *Argersinger* But To Not Abide By *Lassiter* When Defendants Are Charged With Civil Contempt And Subject To Incarceration. . . 21

II. The Minority States Wrongly Assume That Indigent Civil Contemnors "Hold The Key To The Cell Door," Precluding Any Need For Counsel 23

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Adkins v. Adkins,
248 S.E.2d 646 (Ga. 1978) 22

Alabama v. Shelton,
535 U.S. 654 (2002) 9, 11, 12

Andrews v. Walton,
428 So. 2d 663 (Fla. 1983) 15

Argersinger v. Hamlin,
407 U.S. 25 (1972) 9, 11, 21, 22, 24

Bowen v. Bowen,
471 So. 2d 1274 (Fla. 1985) 15

Duval v. Duval,
322 A.2d 1 (N.H. 1974) 17

Ensley v. Ensley,
238 S.E.2d 920 (Ga. 1977) 13

Florida v. Singletary,
549 So. 2d 996 (Fla. 1989) 21

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 11

Gideon v. Wainwright,
372 U.S. 335 (1963) 2-3, n.2, 11

Glover v. United States,
531 U.S. 198 (2001) 9

Gompers v. Buck's Stove & Range Co.,
221 U.S. 418 (1911) 23

Grosjean v. Am. Press Co.,
297 U.S. 233 (1936) 11

In re Gault,
387 U.S. 1 (1967) 11, 12

In re Nevitt,
117 F. 448 (8th Cir. 1902) 24

Int'l Union, United Mine Workers of Am. v. Bagwell,
512 U.S. 821 (1994) 24

Johnson v. Zerbst,
304 U.S. 458 (1938) 11

Jones v. Wharton,
316 S.E.2d 749 (Ga. 1984) 21-22

Lassiter v. Dep't of Soc. Servs.,
452 U.S. 18 (1981) 6, 9, 10, 18, 21

McBride v. McBride,
431 S.E.2d 14 (N.C. 1993) 24

Mead v. Batchlor,
460 N.W.2d 493 (Mich. 1990) 23-24

Miller v. Miller,
652 S.E.2d 754 (S.C. Ct. App. 2007) . . . 12, 13

Pamela R. v. James N.,
884 N.Y.S.2d 323 (Fam. Ct. 2009) 22, 23

Poston v. Poston,
502 S.E.2d 86 (S.C. 1998) 13, 27

Powell v. Alabama,
287 U.S. 45 (1932) 20, 24

Price v. Turner,
691 S.E.2d 470 (S.C. 2010),
cert. granted, 131 S. Ct. 504 . 12, 21-22, 23, 27

Ridgway v. Baker,
720 F.2d 1409 (5th Cir. 1983) 15, 24

Rodriguez v. Eighth Judicial Dist. Ct.,
102 P.3d 41 (Nev. 2004) 17, 18, 19

Scott v. Illinois,
440 U.S. 367 (1979) 11

State v. Rau,
465 S.E.2d 370 (S.C. Ct. App. 1995) 21

State ex rel. Dep't of Human Servs. v. Rael,
642 P.2d 1099 (N.M. 1982) 17, 18, 19

Vitek v. Jones,
445 U.S. 480 (1980) 12

Walker v. McLain,
768 F.2d 1181 (10th Cir. 1985) 24

United States Constitution

Amend. VI 9, 11, 12, 21

Amend. XIV 9, 10-11

Statutes and Rules

Fla. Stat. § 27.51 (2010) 15

Fla. Stat. § 775.02 (2010) 15

Ga. Code Ann. § 15-6-8 (2010) 13

S.C. Code Ann. § 63-3-620 (2010) 12-13

Newspapers and Press Releases

Bill Rankin, *Court knew man jailed for a year for non-support was not child's father*, Atlanta Journal Constitution, July 14, 2009, *available at* http://www.ajc.com/news/court-knew-man-jailed-91036.html 13-14

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Chris Serres and Glenn Howatt, *In jail for being in debt*, Minneapolis Star Tribune, June 9, 2010, *available at* http://www.startribune.com/local/95692619.html 26

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Southern Center for Human Rights Press Release, *State Division of Child Support Services Sends Indigent Iraq War Veteran to Debtor's Prison* (Dec. 15, 2010), http://www.schr.org/action/resources/state_division_of_child_support_services_sends_indigent_iraq_war_veteran_to_debtor 14

Reports

Report of Right to Counsel Committee, The Constitution Project, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (Apr. 2009), http://www.constitutionproject.org/manage/file/139.pdf 4, 5

Report of Right to Counsel Committee, The Constitution Project, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (June 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf 5, 25

Other

Samuel Johnson,
Idler Essay No. 22, Sept. 16, 1758 26

INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. The Constitution Project achieves this goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest state courts, in support of the protection of constitutional rights.

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' (Mr. Turner, Ms. Rogers, and Mr. Price) general consent for *amicus curiae* to submit a brief in this proceeding are on file with the Court. The South Carolina Attorney General's office denies that the State of South Carolina is a party to these proceedings and has asserted that it has no authority therefore to consent.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system.[2] Established in 2004, the

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[2] The Committee members are as follows (affiliations listed for identification purposes only): **Hon. Rhoda Billings** (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice, North Carolina Supreme Court, 1985-1986; Chief Justice, 1986; Judge, State District Court, 1968-1972; **Robert M. A. Johnson** (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; **Hon. Timothy K. Lewis** (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; **Hon. Walter Mondale** (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in favor of Gideon in *Gideon v. Wainwright*; **Hon. William S. Sessions** (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; **Shawn Marie Armbrust**, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; **Hon. Jay W. Burnett**, Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative

(Cont'd on following page)

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(Cont'd from preceding page)

Region of Texas, 1999-2000; **Alan Crotzer**, Senior Clerk, Department of Juvenile Justice; 2006 DNA exoneree; **Dr. Tony Fabelo**, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; **Hon. Norman S. Fletcher**, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; **Monroe Freedman**, Professor of Law and Former Dean, Hofstra University School of Law; **Susan Herman**, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; **Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*; **Abe Krash**, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; **Charles J. Ogletree, Jr.**, Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; **Bryan Stevenson**, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; **Larry D. Thompson**, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; **Hubert Williams**, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; **Norman Lefstein** (Reporter and Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; **Robert Spangenberg** (Reporter), President, The Spangenberg Group.

examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of the United States Supreme Court, and rules of the legal profession, and to develop consensus recommendations for achieving lasting reforms.

The Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. The Committee's recommendations urged States to provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when States fail to comply with those requirements.

The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. JUSTICE DENIED has been cited in a wide variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a

wide array of public figures including U.S. Attorney General Eric Holder.

In 2010, due to concern over the imprisonment of indigent individuals as a result of non-criminal proceedings, the Right to Counsel Committee reconvened to issue a new recommendation to add to the existing recommendations in JUSTICE DENIED. Recognizing that a handful of States have created "*de facto* 'debtor's prisons' in which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the opportunity to be represented by counsel," the Right to Counsel Committee added the following recommendation to its seminal work:

> Except in direct summary contempt proceedings, States should ensure that, in the absence of a valid waiver of counsel, quality representation is provided to all persons unable to afford counsel in proceedings that result in a loss of liberty regardless of whether the proceeding is denominated civil or criminal in nature.

Report of Right to Counsel Committee, The Constitution Project, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (June 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf.

SUMMARY OF ARGUMENT

> [T]he Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.
>
> *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 26-27 (U.S. 1981)

This case calls for a narrow decision that will further elucidate the Court's prior pronouncements that in *any* proceeding resulting in the defendant's loss of liberty, the defendant is constitutionally entitled to be advised of the right to counsel and, if indigent, to have counsel appointed. A defendant should never be prevented from enjoying this fundamental constitutional protection simply because a proceeding is denominated as "civil." Indeed, the vast majority of States recognize the overarching principle that it is the loss of liberty that triggers the right to counsel, not the nature of the proceedings. Nevertheless, at least three States, including South Carolina, Georgia, and Florida, do not recognize such a right despite the Court's pronouncements to the contrary. A handful of other

States, including New Hampshire, New Mexico, and Nevada, permit courts to decide the need for counsel on a case-by-case basis. It is time to draw all of these States under the constitutional umbrella.

The Court should not be concerned that an express recognition of a defendant's right to counsel when his liberty interest is invoked will create a waterfall effect requiring counsel to be appointed to indigent defendants in every civil proceeding. Rather, this case raises a discrete question that most States already recognize as a settled point of law: indigent defendants to a civil contempt charge must be appointed counsel when their liberty interest is jeopardized; to do otherwise, risks a defendant being jailed without due process.

The burden placed on civil contemnors to prove their inability to comply with a court order coupled with their financial inability to "purge" the contempt by paying the court ordered amount often makes it impossible for indigent defendants in civil contempt proceedings to avoid serving sentences of as long as a year. Upon release, an indigent contemnor remains at risk of being re-arrested on a similar charge and returned to jail. This places indigent contemnors on a treadmill where they are unable to work because they are in jail, unable to purge their contempt because they are indigent, and unable to prove their indigence in the first instance because they are neither informed of a right to counsel nor provided court-appointed counsel.

Mr. Turner's case is illustrative, although regrettably not unusual in the minority of States

that have held defendants are not entitled to counsel in civil proceedings when their liberty is at stake. Mr. Turner's entire "evidentiary" hearing makes up three pages of the record. (Pet. App. 16a-18a.) He spoke a total of 169 words at his hearing, 120 of which were intended as an explanation to the court of his inability to pay. (Pet. App. 17a.) The court never advised Mr. Turner of his right to counsel nor did it give Mr. Turner any assistance beyond asking, "Is there anything you want to say?" (*Id.*) Even when Mr. Turner asked why he would not receive statutory work or good time credits during his incarceration, the court replied only, "Because that's my ruling." (*Id.*) Having received less than a minute of the court's time, Mr. Turner was incarcerated for one year in the Oconee County, South Carolina Detention Center for his "willful contempt." (*Id.*)

The fact that Mr. Turner and thousands like him are provided no constitutional due process protection is extraordinary given the Court's pronouncements to the contrary. Reversing the South Carolina Supreme Court will clarify once and for all that the risk of loss of liberty triggers a constitutional right to counsel no matter whether the case is denominated "civil" or "criminal."

ARGUMENT

I. The Court Has Already Recognized That Indigent Defendants In A Civil Action Have A Right To Appointed Counsel When Loss Of Liberty Is At Stake; Resolving This Case In Favor Of Mr. Turner's Position Will Clarify The Standard To The Minority States

No more is needed here than a narrow decision clarifying to the States that the standard for a constitutional right to counsel is based not on whether the hearing is designated as "civil" or "criminal," but rather on whether the defendant's physical liberty interest is jeopardized.

The Court already recognized this standard in *Lassiter v. Department of Social Services*, where it set forth that it is "the defendant's interest in personal freedom, *and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal cases*, which triggers the right to appointed counsel." 452 U.S. 18, 26 (1981) (establishing that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel") (emphasis added). More recently, the Court emphasized that "no person may be imprisoned for *any offense* . . . unless he was represented by counsel at his trial." *Alabama v. Shelton*, 535 U.S. 654, 664-65 (2002) (emphasis in original) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) (recognizing that "any amount of actual jail time has Sixth Amendment significance").

The clarification that Mr. Turner seeks is logical and needed given the Court's precedents in both the civil and criminal contexts, which the vast majority of States have already implemented. Only a minority of States, including South Carolina, continue to permit indigent defendants to be banished to modern day debtors' prisons under the pretext that the indigent have ready funds available to purge their contempt and unlock their cell doors. Under the Court's prior guidance, there can be no proper outcome other than that a defendant in any proceeding that results in loss of liberty (other than summary contempt proceedings) must be advised of his right to counsel and, if indigent, be appointed counsel unless the right is knowingly and intelligently waived, no matter whether the proceeding is "civil" or "criminal" in nature. Any other outcome will result in fundamental unfairness.

A. "Fundamental Fairness" Requires Counsel To Be Made Available Absent The Defendant's Specific Waiver Of The Right In Any Proceeding That Results In Loss Of Liberty

A long line of cases leads us to this moment. As the Court itself has stated, its precedents "speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel," which is "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 26-27.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal

prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." This right to counsel is recognized as a fundamental right of life and *liberty* extended to the States by the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property without due process of law"). *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936)); *see also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)). Under that standard, no indigent defendant whose liberty is at stake can be "assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. *See also Shelton*, 535 U.S. at 664-65 (recognizing the right to counsel before a suspended sentence may be imposed); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (recognizing the right to counsel if the trial leads to actual imprisonment); *Argersinger*, 407 U.S. at 37 (recognizing the right to counsel in any criminal prosecution "whether classified as petty, misdemeanor or felony" that actually leads to imprisonment, even if only briefly). *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 787-89 (1973) (denying a right to appointed counsel in revocation of probation proceedings).

These and other Sixth Amendment cases have helped to inform the Court's decisions applying the right to counsel in civil matters as a fundamental due process right when a defendant's liberty interest is at stake. Indeed, the Court has said that it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'" in cases invoking a defendant's liberty interest. *In re Gault*, 387 U.S.

1, 27-28 (1967) (recognizing a right to counsel for juveniles in delinquency proceedings); *see also Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (plurality) (recognizing a prisoner as having a due process right to counsel before he can be involuntarily sent to a psychiatric institution). In sum, the Court's decisions reveal that whether an individual case is decided under the Sixth Amendment for criminal matters (*e.g.*, *Shelton*) or the Due Process Clause for civil matters (*e.g.*, *Gault*), it is the defendant's liberty interest that is the universal standard for determining when a defendant has a constitutional right to counsel.

B. Each Of The Minority States Has Either Barred Any Right To Appointed Counsel In Civil Contempt Actions Entirely Or Has Established A Case-By-Case Procedure That Effectively Bars The Right To Appointed Counsel

Mr. Turner's concerns were dismissed by the South Carolina Supreme Court under the rubric that this was civil contempt under which a defendant is not entitled to the "additional constitutional safeguards" that would have been Mr. Turner's had he been charged with criminal contempt. *Price v. Turner*, 691 S.E.2d 470, 472 (S.C. 2010), *cert. granted*, 141 S. Ct. 504 (2010) (describing Mr. Turner's twelve month sentence as a "classic civil contempt sanction") (citing *Miller v. Miller*, 652 S.E.2d 754, 761 (S.C. Ct. App. 2007)). South Carolina does not distinguish between "civil" and "criminal" contempt under its statute with respect to potential penalties. S.C. Code Ann. § 63-3-620

(2010). The differentiation between "civil" and "criminal" in contempt proceedings, in practice, however, often favors criminal contemnors who are afforded a right to counsel, given the opportunity to present a true defense and, if found guilty, penalized a set period of time that is often far less than the time served by an indigent civil contemnor whose sentence may be open-ended. *See, e.g., Poston v. Poston*, 502 S.E.2d 86, 89 (S.C. 1998) (discussing different burdens for civil and criminal contempt defendants); *Miller*, 652 S.E.2d at 761 (same).

In Georgia—another minority state—a criminal contemnor by statute may not be sentenced to more than 20 days, Ga. Code Ann. § 15-6-8 (2010), whereas a civil contemnor may be "imprisoned for an unspecified period" until he "performs a specified act." *Ensley v. Ensley*, 238 S.E.2d 920, 921-22 (Ga. 1977) (explaining that incarceration for criminal contempt is punitive, whereas incarceration for civil contempt is remedial).

The story of Georgia's Frank Hatley illustrates the danger of indefinite "civil" incarceration. Jailed for more than a year for non-payment of child support, Frank Hatley was released only after attorneys with the Southern Center for Human Rights ("SCHR") became involved. SCHR Press Release, *South Georgia Man Released from Year-Long Incarceration: Jailed For Being Too Poor To Support A Child That Is Not His* (July 15, 2009), http://www.schr.org/action/resources/falsepaternity; *see also* Bill Rankin, *Court knew man jailed for a year for non-support was not child's father*, Atlanta Journal Constitution, July 14, 2009, *available at*

http://www.ajc.com/news/court-knew-man-jailed-910-36.html. A paternity test in 2000 showed that Mr. Hatley was not the father of the child he had been helping to support for eleven years, but the court continued to hold Mr. Hatley responsible for back payments. For the next eight years, Mr. Hatley paid. Then Mr. Hatley lost his job, lost his home, and moved into his car. Still, he made payments when he could. When his money ran out, the court stepped in and charged him with contempt. Without legal representation at his contempt hearing, Mr. Hatley was unable to show the court that his failure to pay was not willful but rather based on indigence. More than a year later, he was still incarcerated. At the time of Mr. Hatley's incarceration, 45 of the 140 inmates at the jail were also incarcerated for nonpayment of support. SCHR Press Release.

Another Georgia man is presently in prison waiting for an end to his 90 to 120 day incarceration. Randy Miller, a father of three and an Iraq War veteran who fell behind on his support payments after losing his job, was incarcerated on November 15, 2010, when a court ordered him either to pay $3,000 he did not have or go to jail. See SCHR Press Release, *State Division of Child Support Services Sends Indigent Iraq War Veteran to Debtor's Prison* (Dec. 15, 2010), http://www.schr.org/action/resources/state_division_of_child_support_services_sends_indigent_iraq_war_veteran_to_debtor. Sadly, Mr. Miller's incarceration began four days after he had finally found a job. *Id.*

Other minority States offer a different, yet similarly erroneous, rationale right for the denial of

counsel. Florida, for example, like South Carolina, statutorily limits jail sentences for civil and criminal contemnors to a period not to exceed twelve months. Fla. Stat. § 775.02 (2010); but by law, Florida's public defenders are required to represent indigent defendants charged with criminal contempt. Fla. Stat. § 27.51 (2010). No such law protects civil contemnors. Rather, Florida's civil contempt law operates under a legal conceit that because a court requires a finding that the defendant has a "present ability to purge" the contempt, counsel need not be appointed. *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985); *see also Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983) (determining that "fundamental fairness" prevents indigent contemnors from being imprisoned, therefore no counsel is needed). Under this analysis, "there are no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment." *Bowen*, 471 So. 2d at 1278 (quoting *Andrews*, 428 So. 2d at 666). The starting point for that analysis is no different than the one adopted by the South Carolina Supreme Court. Both courts presume an accurate determination of the contemnor's ability to pay. But it is the alleged contemnor's burden to show thereafter that he or she does not have the present ability to pay. *Bowen*, 471 So. 2d at 1278-79. Being able to adequately present the court with a defense, including the inability to pay, of course, is the purpose of appointing counsel, which is defeated under the Florida rule.

Like South Carolina, Georgia and Florida are in direct conflict with this Court's decisions requiring counsel to be provided when a defendant's liberty interest is at stake. They ignore the warning abided by the vast majority of States that have decided this issue that no matter how a contempt case is denominated, if the defendant's liberty is at stake, he is owed a right to counsel for one reason:

> If the court errs in its determination that the defendant has the means to comply with the court's order, the confinement may be indefinite. Such an error is more likely to occur if the defendant is denied counsel. Viewed in this light, a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled "criminal," with a correspondingly greater need for counsel.

Ridgway v. Baker, 720 F.2d 1409, 1414 (5th Cir. 1983) ("the line between civil and criminal contempt is rarely as clear as the state would have us believe").

Those minority States that provide for counsel to be appointed only on a case-by-case basis in civil contempt proceedings also are violating the due process rights of the defendant. It should not be left to individual courts to decide whether an individual defendant has a right to counsel where incarceration is involved. Even so, certain minority States continue to subscribe to this erroneous point of view. In New Hampshire, for example, a court may at its

discretion provide a defendant the right to counsel only in a "*complicated* nonsupport contempt hearing." *Duval v. Duval*, 322 A.2d 1, 3 (N.H. 1974) (emphasis added). New Hampshire courts recognize that where "issues of sufficient complexity" exist, it would be unfair to deny indigent defendants "the benefit of counsel if they were unable to retain a lawyer because of their financial condition." *Id.* (citation omitted). That standard, however, would not help New Hampshire defendants in situations like Mr. Turner's. Mr. Turner's hearing, the transcript of which encompasses a mere three pages of the record (Pet. App. 16a-18a), undoubtedly would not have met New Hampshire's "complexity" requirement. Yet, that brief and routine hearing sent Mr. Turner to prison for one year. Courts clearly may wrongly assume that complex issues are not present. To the contrary, the burden on a defendant to establish the inability-to-comply defense is a difficult one.

The courts of New Mexico and Nevada apply a similarly erroneous "complexity" requirement. *See, e.g., State ex rel. Department of Human Servs. v. Rael*, 642 P.2d 1099, 1104 (N.M. 1982); *Rodriguez v. Eighth Judicial Dist. Court*, 102 P.3d 41, 51 (Nev. 2004). The New Mexico Supreme Court has incorrectly held that circumstances such as those that resulted in Mr. Turner's lengthy incarceration are precisely the circumstances that do not support the appointment of counsel. *Rael*, 642 P.2d at 1103 ("The defendant is usually capable of marshalling the financial facts, assessing the accuracy of the monetary claim against him and making some sort of presentation to the court."). The *Rael* court opined

that a court's inquiry into a "defendant's ability to pay, reasons for arrearage and mitigating circumstances normally are not complicated and so do not require the assistance of an attorney to clarify them for the court." *Id.* (internal citation omitted). As discussed below, that reasoning fails.

Under New Mexico's rules, the court is the "proper evaluator of the need for counsel on a case-by-case basis, considering factors such as the indigent's ability to understand the proceeding, the complexity of the legal and factual issues, and the defenses that might be presented." *Id.* at 1104. Although the *Rael* court acknowledged this Court's *Lassiter* pronouncement regarding the importance of counsel when a defendant's liberty interest is at stake, it determined that a "defendant's interest in his personal liberty, though an extremely important one, is not as strong as it would be if he were being *criminally* prosecuted or charged with *criminal* contempt," because he "has the keys to his own prison." *Id.* at 1102-03 (emphasis added).

The Nevada Supreme Court has similarly erred in holding that "fundamental fairness does not require the appointment of counsel in every nonsupport contempt hearing when a party faces incarceration." *Rodriguez*, 102 P.3d at 51. It is the Nevada Supreme Court's opinion that a case requiring the aid of counsel is the "exception, not the rule." *Id.* Under Nevada rules, a defendant in a civil contempt case is generally not entitled to counsel because it would be a rare defendant who could not understand the proceedings or marshal the financial facts necessary to put on a defense. *Id.* In Nevada,

too, a defendant's liberty interest is deemed diminished because "the contemnor holds the key to his freedom through willful compliance." *Id.*

Courts in the "case-by-case" jurisdictions rely on a legal theory that counsel is generally not needed because of the State's burden to show willfulness. Absent a showing of willfulness, there can be no contempt. *See, e.g., id.* at 50. As discussed with respect to the Florida rule, however, "willfulness" begins with a presumption of an ability to pay—not a presentation of proving willfulness. It is actually the defendant's burden to show the inability to pay. Mr. Turner's case is a prime example of "willfulness" being shown on the basis of this presumption rather than a showing of willfulness based on his actual income. (Pet. App. 17a; 20a-21a.) Mr. Turner did not hold the "keys to his own prison," as the *Rael* court might have theorized. *Rael*, 642 P.2d at 1102-03. But had he been in a "case-by-case" jurisdiction, he would have fared no better than he fared under South Carolina's rigid rule barring a right to appointed counsel in civil contempt proceedings.

Minority States place a double burden on a civil defendant charged with violating a court order to pay a debt or to pay child support. Not only does the burden shift to the defendant to prove his own inability to pay, a civil defendant must (a) comprehend that he bears that burden, (b) prepare his defense, (c) navigate the court's procedural rules and customs, and (d) put on an evidentiary hearing, usually without any legal education or related experience whatsoever. As the Court acknowledged almost 80 years ago, indigent defendants are

unlikely to have the ready skills available to mount such a defense without the benefit of counsel:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

It would be inherently unfair to an alleged civil contemnor to make the right to counsel subject to the vagaries of judicial discretion when the defendant's liberty interest is at stake and when the defendant bears the burden to establish his defense. Complexity is subjective and even in the two examples provided by the New Mexico and Nevada courts, it is made clear that the opportunity to have counsel appointed would be limited to very few instances. As the record shows, Mr. Turner's hearing might have appeared to be routine, and yet the assistance of counsel would have in all likelihood changed the outcome of the case. (Pet. App. 16a-18a.)

All courts of the United States must universally recognize the constitutional standard that an

indigent defendant is always entitled to counsel in a civil contempt proceeding when his liberty interest is at stake. Due process should not depend upon the State in which a defendant resides. By any measure, that is constitutionally deficient and fundamentally unfair.

C. It Is Illogical For The Minority States To Require Counsel For Defendants Charged With Misdemeanors Per *Argersinger* But To Not Abide By *Lassiter* When Defendants Are Charged With Civil Contempt And Subject To Incarceration

States that follow the minority view, including South Carolina, have acknowledged this Court's instruction in *Argersinger* regarding the Sixth Amendment right to counsel in cases where the defendant is charged with a misdemeanor. *See, e.g.*, *State v. Rau*, 3465 S.E.2d 370 (S.C. Ct. App. 1995) (discussing *Argersinger* and describing "[o]ne of the most valued rights that a defendant can have" as "his Sixth Amendment right to assistance of counsel"); *Florida v. Singletary*, 549 So. 2d 996, 997 (Fla. 1989) ("Any defendant who faces the possibility of incarceration must be provided the services of a lawyer if he cannot afford one. It is axiomatic that these services are deemed essential because of the lawyer's training and expertise."); *Jones v. Wharton*, 316 S.E.2d 749 (Ga. 1984) ("When an accused is placed on trial for any offense, whether felony or misdemeanor, for which he faces imprisonment, the constitutional guarantee of right to counsel attaches."). Yet, they fail to recognize an equivalent concern for defendants in civil contempt cases. *See*

e.g., *Turner*, 691 S.E.2d at 472 n.2 ("We recognize that in holding a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position."); *Adkins v. Adkins*, 248 S.E.2d 646 (Ga. 1978) ("A contempt for failure to pay child support is a civil proceeding. Its primary purpose is to provide a remedy for the collection of child support by coercing compliance with such an order. *Argersinger* relates to criminal prosecutions and is not applicable."). It is illogical that these States decline to provide counsel to indigent defendants in civil contempt proceedings where incarceration is involved.

There is a fine line between whether an act is civil or criminal and "in many circumstances, a civil contempt may have more serious consequences than a criminal contempt." *Pamela R. v. James N.*, 884 N.Y.S.2d 323, 328 (Fam. Ct. 2009). A criminal contemnor, however, is provided a full panoply of protections, including the right to counsel, while a civil contemnor in the minority States stands alone. Furthermore, as discussed more fully above, mounting a defense in civil contempt case can be particularly difficult. Unlike criminal contempt cases where the government bears the burden of proof, the moving party in a civil contempt proceeding need only make a simple *prima facie* case and has no obligation to prove the defendant is actually capable of paying. The defendant must then prove his defense, which can be quite difficult, particularly for someone without legal training.

South Carolina and other minority States have acknowledged the constitutional right of counsel for

criminal defendants even when incarceration may only be for a brief period. At the same time, these same States refuse to protect indigent defendants charged with civil contempt facing indefinite incarceration if they are too poor to pay and are unable to put on an adequate defense without counsel. That is fundamentally unfair.

II. The Minority States Wrongly Assume That Indigent Civil Contemnors "Hold The Key To The Cell Door," Precluding Any Need For Counsel

It has become a common turn of phrase that incarceration for civil contempt is merely coercive—and thus not requiring due process in the minority States—rather than punitive, because civil contemnors "hold the key to the cell door," in that they can purge their contempt at any time. *Turner*, 691 S.E.2d at 472; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911) (he "carries the keys of his prison in his own pocket") (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)); *Pamela K.*, 884 N.Y.S.2d at 328 ("the best rule of thumb for distinguishing between criminal and civil contempts is that if the respondent 'holds the keys to the jail cell in his hands,' then it is a civil contempt"). Nothing could be further from the truth.

A civil contemnor who does not have the present ability to pay "does not have the 'keys to his jail'; what is nominally a civil contempt proceeding is in fact a criminal proceeding—the defendant is not being coerced, but punished." *Mead v. Batchlor*, 460 N.W.2d 493, 496 (Mich. 1990) (citation omitted); *see also Int'l Union, United Mine Workers of Am. v.*

Bagwell, 512 U.S. 821, 831 (1994) (acknowledging that "[t]o the extent that such [civil] contempts take on a punitive character . . . criminal procedural protections may be in order"); *Walker v. McLain*, 768 F.2d 1181, 1184 (10th Cir. 1985) (noting that if a contemnor is truly indigent, "his liberty interest is no more conditional than if he were serving a criminal sentence"); *McBride v. McBride*, 431 S.E.2d 14, 19 (N.C. 1993) ("the facts of the present case illustrate that trial courts do not always make such a determination [of the present ability to pay] prior to ordering the incarceration of a civil contemnor"). Despite indigence being a complete defense to a civil contempt charge, a defendant bears virtually the entire evidentiary burden without the skills or knowledge to master it. *Ridgway*, 720 F.2d at 1414 ("The indigent who appears without a lawyer can be charged neither with knowledge that he has such a burden nor with an understanding of how to satisfy it"). *See also Argersinger*, 407 U.S. 25 at 30 ("He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be . . . convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.") (quoting *Powell*, 287 U.S. at 68-69).

Amicus's Right to Counsel Committee spent four years investigating infirmities in the American judicial system regarding the constitutional right to counsel as applied, and supplemented its findings in 2010 due to a growing awareness that the minority States have created "*de facto* 'debtor's prisons' in which individuals too poor to pay their fines or court-ordered obligations are incarcerated based on their inability to pay, without being afforded the

opportunity to be represented by counsel." *See* The Constitution Project, Right to Counsel Committee, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, Recommendation 23 (June 28, 2010), http://www.constitutionproject.org/manage/file/416.pdf. This diverse Committee recognized, as many courts have, that this form of imprisonment is in reality no more conditional than a criminal sentence. *Id.*

"Indigent" and "obdurate" are not synonymous. Even so, Mr. Turner and thousands like him have been incarcerated without any reasonable opportunity to mount a defense. Modern day debtor's prisons are being increasingly used theoretically to "coerce" indigent people who are unable to pay their debts. Because in recent years, courts have been more frequently called upon to assist in cases involving consumer debt, the concept of "debtors' prisons" lately has received much broader attention. *See, e.g.*, Editorial, *The New Debtors' Prisons*, N.Y. Times, Apr. 6, 2009, *available at* http://www.nytimes.com/2009/04/06/opinion/06mon4.html (calling the practice "barbaric and unconstitutional"); *see also* Chris Serres and Glenn Howatt, *In jail for being in debt*, Minneapolis Star Tribune, June 9, 2010, *available at* http://www.startribune.com/local/95692619.html (describing their analysis that in Minnesota, "the use of arrest warrants against debtors has jumped 60 percent over the past four years, with 845 cases in 2009"); Editorial, *People find themselves arrested—and in jail—because they owe money*, Las Vegas Sun, June 14, 2010, *available at* http://www.lasvegassun.com/

news/2010/jun/14/debtors prisons/ (calling for "an end to this despicable practice").

Florida, one of the minority States that do not recognize a right to counsel in civil contempt proceedings, has also "resurrected the *de facto* debtor's prison" and has jailed hundreds of people for failing to pay their debts. *See* Editorial, *Debtors' prison—again*, St. Petersburg Times, Apr. 14, 2009, *available at* http://www.tampabay.com/opinion/editorials/article991963.ece.

In reality, *de facto* debtors' prisons existed for civil contemnors who were unable to pay long before the present economic difficulties in the United States made their concept interesting editorial copy. And they will continue to exist for as long as "poverty is punished among us as a crime." Samuel Johnson, Idler Essay No. 22, Sept. 16, 1758 (opining that poverty should be treated with the same lenity as other crimes; rather than leaving the debtor languishing in a debtor's prison, the onus must be on the creditor to prove the debtor's assets).

As Mr. Turner's case exemplifies, indigent defendants in the minority States have no right to appointed counsel, have no means of understanding how to put on a defense, and are vulnerable to making admissions against their own interests in court. Moreover, the proceedings are so streamlined that no true evidentiary hearing takes place to determine indigence. Indigent defendants are, in effect, punished for their poverty. Despite this, the South Carolina Supreme Court authorizes no "constitutional safeguards" for accused civil

contemnors, explaining the difference between "civil" and "criminal" contempt as follows:

> A contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do. This distinction between civil and criminal contempt is crucial because *criminal contempt triggers additional constitutional safeguards*.

Turner, 691 S.E.2d at 472 (citing *Poston*, 502 S.E.2d at 88 (emphasis added; internal citations omitted)).

Mr. Turner deserved the right to counsel before spending a year in the South Oconee Detention Center. Civil contemnors only hold the keys to their cell doors when they have the present ability to purge their contempt. In many cases, indigent contemnors have neither resources to purge their contempt nor knowledge of the judicial system to prove their indigence. Their only choice is to languish in jail—a 21st century form of debtors' prison—until the passage of time allows for their release. This is punitive, not coercive, and the Court should take this opportunity to clarify that a defendant is entitled to counsel in any proceeding resulting in a loss of liberty without regard to whether the proceeding is denominated "civil" or "criminal."

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of South Carolina should be reversed.

Dated: January 11, 2011

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AMICUS CURIAE BRIEF

16

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IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF SENATORS DEMINT, GRAHAM, JOHANNS, AND RUBIO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE RIGHT TO COUNSEL EXISTS TO PREVENT WRONGFUL CONVICTION FOR CRIMINAL OFFENSES AND IS LIMITED TO CRIMINAL PROCEEDINGS 5

II. CIVIL CONTEMPT WITH THE THREAT OF INCARCERATION IS A HIGHLY-EFFECTIVE ENFORCEMENT TOOL THAT STATES WILL NO LONGER BE ABLE TO USE IF IT IS ENCUMBERED WITH THE RIGHT TO COUNSEL 19

III. THE COURT SHOULD DECLINE TO OVERRULE LONG-SETTLED PRECEDENT DISTINGUISHING BETWEEN CIVIL AND CRIMINAL CONTEMPT 27

CONCLUSION 32

APPENDIX A: Compendium of Responses Collected by the U.S. Department of Health and Human Services Office of Child Support Enforcement (Dec. 28, 2010) 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Alabama v. Shelton,
535 U.S. 654 (2002) 13

Allen v. Illinois,
478 U.S. 364 (1986) 29

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 20

Bessette v. W.B. Conkey Co.,
194 U.S. 324 (1904) 30

Brewer v. Williams,
430 U.S. 387 (1977) 8

Commonwealth ex rel. Brown v. Hendrick,
283 A.2d 722 (Pa. Super. Ct. 1971) 17

Danforth v. Minnesota,
552 U.S. 264 (2008) 20

Doyle v. London Guarantee Co.,
204 U.S. 599 (1907) 30

Ex parte Grossman,
267 U.S. 87 (1925) 29

Fox v. Capital Co.,
299 U.S. 105 (1936) 29

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 8, 9, 11

Gideon v. Wainwright,
372 U.S. 335 (1963) 7, 8

Gompers v. Buck's Stove & Range Co.,
221 U.S. 418 (1911) ..... *passim*

Herring v. New York,
422 U.S. 853 (1975) 8

Hicks ex rel. Feiock v. Feiock,
485 U.S. 624 (1988) 28, 29, 30, 31

In re Christensen Engineering Co.,
194 U.S. 458 (1904) 30

Iowa v. Tovar,
541 U.S. 77 (2004) 13

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
130 S. Ct. 1605 (2010) 27

Johnson v. Zerbst,
304 U.S 458 (1938) 7

Kirby v. Illinois,
406 U.S. 682 (1972) (plurality opinion) 5

Lamb v. Cramer,
285 U.S. 217 (1932) 29

Libretti v. United States,
516 U.S. 29 (1995) 12

Michigan v. Harvey,
494 U.S. 344 (1990) 8

Middendorf v. Henry,
425 U.S. 25 (1976) 9, 26

Nye v. United States,
313 U.S. 33 (1941) 29

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 20

Oriel v. Russell,
278 U.S. 358 (1929) 29

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 11, 13

Pasqua v. Council,
892 A.2d 663 (N.J. 2006) 25

Penfield Co. v. SEC,
330 U.S. 585 (1947) 29

Porter v. McCollum,
130 S. Ct. 447 (2009) 12

Rothgery v. Gillespie Cnty.,
554 U.S. 191 (2008) 5

United Mine Workers v. Bagwell,
512 U.S. 821 (1994) 27, 28, 31

United States v. Ash,
413 U.S. 300 (1973) 6, 7, 8

United States v. Morrison,
449 U.S. 361 (1981) 8

United States v. Rylander,
460 U.S. 752 (1983) 10, 29

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 26

Wiggins v. Smith,
539 U.S. 510 (2003) 12

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 8 26

U.S. Const. Amend. V 27

U.S. Const. Amend. VI 3, 5, 8, 13

U.S. Const. Amend. XIV 25

STATUTES AND REGULATIONS

42 U.S.C §§ 651 *et seq.* 1

42 U.S.C. § 666 1

Cal. Civ. Proc. § 1209.5 (West 1982) 29

Pub. L. No. 93-647, § 101(a), 88 Stat. 2351 1

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 1

Expenditures For Which Federal Financial Participation Is Not Available, 45 C.F.R. § 304.23 26

Prohibition of Federal Funding of Costs of Incarceration and Counsel for Indifent Absent Parents, 52 Fed. Reg. 32,130 (Aug. 26, 1987) 26

CONGRESSIONAL RECORD

144 Cong. Rec. 8827 (1998) 2

155 Cong. Rec. S10700 (2009) 2, 32

S. Rep. No. 98-387 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397 26

OTHER AUTHORITIES

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F. Heller, The Sixth Amendment (1951) 7

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Michigan Supreme Court, *Underground Economy* (2010), http://courts.michigan.gov/scao/resources/publications/reports/UETF-2010.pdf 2, 17

Office of Child Support Enforcement, *Table 5: Current And Arrears Collections Due And Distributed, FY 2008, available at* http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/preliminary_report_fy2008/table_5.html 2

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BRIEF OF SENATORS DEMINT, GRAHAM, JOHANNS, AND RUBIO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

This case concerns the procedural protections afforded to noncustodial parents in state civil contempt proceedings to enforce child support obligations. South Carolina's child support enforcement program—like the programs in every state—is part of a comprehensive federal-state partnership first implemented by Congress in 1974. Pub. L. No. 93-647, § 101(a), 88 Stat. 2351 (42 U.S.C. §§ 651 *et seq.*) (adding Title IV-D to the Social Security Act). Approximately ten years after implementing the program, Congress enacted the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305. This legislation requires states to deduct unpaid child support from delinquent parents' tax refunds, allows liens to be imposed on delinquent parents' property, and compels employers to withhold child support from delinquent parents' pay. *Id.* § 3(b) (codified as amended at 42 U.S.C. § 666 (2006)).

Amici curiae are Senators Jim DeMint and Lindsey Graham of South Carolina, Senator Mike Johanns of

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Nebraska, and Senator Marco Rubio of Florida. As members of Congress, *amici* have a substantial interest in preserving the congressional choices and compromises that created the comprehensive federal-state partnership regulating child support enforcement nationwide. South Carolina has implemented a reasonable, congressionally-authorized policy in this area and that policy deserves respect. Further, as many members of Congress have noted, failure to pay child support is a major problem that inflicts tremendous social and financial costs on custodial parents and children. *See, e.g.*, 155 Cong. Rec. S10700, 10705-06 (2009) (statements of Senators Kohl and Rockefeller) (describing child support payments as a much-needed "lifeline" for custodial parents); 144 Cong. Rec. 8827 (1998) (statement of Rep. McCollum) (describing failure to pay child support as an "abdication of moral and legal duty by deadbeat parents"). Indeed, as of September 30, 2008, the federal Office of Child Support Enforcement reported that child support arrears totaled $105.5 billion nationally. *See* Mich. Supreme Court, *Underground Economy* 11-12 (2010), http://courts.michigan.gov/scao/resources/publications/reports/UETF-2010.pdf (citing Office of Child Support Enforcement, *Table 5: Current And Arrears Collections Due And Distributed, FY 2008*, *available at* http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/preliminary_report_fy2008/table_5.html (last checked January 27, 2011)). The failure of noncustodial parents to pay their child support is a national problem and Congress has expended tremendous effort developing a federal-state regulatory regime to solve it. Members of Congress can thus offer the Court a unique perspective on the

effects of upsetting this legislative framework by imposing additional requirements on cash-strapped states.

SUMMARY OF ARGUMENT

Petitioner Michael Turner is a noncustodial parent who has consistently refused to honor his child support obligations. He now asks the Court—on behalf of delinquent parents everywhere—to overturn a century of settled precedent and establish a broad new entitlement to state-funded counsel whenever a civil litigant faces the prospect of detention for civil contempt. The Court should refuse petitioner's request for state-funded counsel in civil disputes for three independent reasons.

First, the right to counsel exists to prevent the state and federal governments from convicting people of crimes they did not commit. It has never been extended to civil disputes between private parties. The Sixth Amendment does not mince words: "In all *criminal prosecutions*, the accused shall enjoy the right ... to have the assistance of counsel for his defense." US Const. amend. VI (emphasis added). The Amendment is so limited because criminal proceedings involve professional prosecutors seeking to impose punishment. In civil proceedings, by contrast, private parties face each other and punishment is not a factor.

Civil contempt is no different. It is simply the mechanism courts use to police civil litigation and enforce decrees incident to that litigation. No indictments are filed, there is no requirement of probable cause, contemnors are not read their *Miranda* rights, professional prosecutors are not involved, and on the rare occasions when contemnors

face imprisonment, it is only where a court determines that they have the capacity to comply with a court's orders but nonetheless refuse to do so. As the Court has long recognized, a civil contemnor "carries the keys of his prison in his own pocket," *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911): the contemnor is released the instant he or she chooses to comply with the court's orders.

Providing state-funded counsel to one side of a civil dispute would shatter the fundamental parity between the parties that underlies the civil system. Upsetting the balance would be a particularly serious problem in the child support context, where custodial parents are often pro se. If petitioner prevails, custodial parents will not only have to fend for themselves in court, but they will be forced to litigate against state-funded lawyers. This, in turn, will seriously undermine the judicial system's ability to enforce a noncustodial parent's obligation to pay child support, ultimately to the detriment of the children who depend on that support.

Second, federalism and respect for congressional authority require honoring reasonable policy choices made by the states and Congress to achieve permissible goals. In the child support context, civil contempt backed by the threat of incarceration is a highly effective tool, which states like South Carolina reserve for only the most extreme circumstances. The Federal Office of Child Support Enforcement has compiled information on state programs, all of which illustrate the value of detention as a tool for collecting child support from unwilling noncustodial parents. Moreover, these survey results demonstrate that most states cannot afford a broad new

entitlement to counsel. They would have to stop using this enforcement mechanism altogether, thus removing from their quivers a powerful tool to compel noncustodial parents' compliance with their child support obligations.

Third, the Court has always clearly distinguished between civil and criminal contempt. Civil contempt sanctions are used to compel compliance with court orders. Inability to comply is a full defense and detention is never punitive. Extending criminal protections like the right to counsel—which would eventually bring the full panoply of criminal procedural protections along with it—to civil contempt cases would require overturning at least one hundred years of settled constitutional law dating back to *Gompers*, 221 U.S. at 442. Petitioner provides no reason to abandon this precedent and that long-established distinction.

ARGUMENT

I. THE RIGHT TO COUNSEL EXISTS TO PREVENT WRONGFUL CONVICTION FOR CRIMINAL OFFENSES AND IS LIMITED TO CRIMINAL PROCEEDINGS.

The Sixth Amendment exists to prevent individuals from being wrongfully convicted of crimes. The rights enshrined therein protect the accused from the power of the state and are accordingly limited, as the text says, to "criminal prosecutions." U.S. Const. Amend. VI. That limitation is not "mere formalism." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

The limitation to criminal prosecutions applies with particular force to the right to state-paid counsel.

The purpose of the right to counsel is to create parity between the accused on one side, and the state's professional prosecutor on the other. The right does not, however, exist to help civil defendants, such as Mr. Turner, avoid complying with court orders—such as an order to make child support payments—where, as here, a neutral court has concluded that the defendant is capable of complying with the order. And it certainly does not exist to help civil defendants oppose legitimate claims filed by pro se, indigent mothers like Ms. Rogers.

1. From its inception, the right to counsel has ensured parity in criminal proceedings. The framers included it in the Bill of Rights to offset the power of the public prosecutor. *See, e.g., United States v. Ash*, 413 U.S. 300, 308 (1973) (explaining that one "factor contributing to the colonial recognition of the accused's right to counsel was the adoption of the institution of the public prosecutor from the Continental inquisitorial system"). The right and the increasing reliance on public prosecutors were inextricably linked. As the Court has explained:

> [E]arly in the eighteenth century the American system of judicial administration adopted an institution which was (and to some extent still is) unknown in England: while rejecting the fundamental juristic concepts upon which continental Europe's inquisitorial system of criminal procedure is predicated, the colonies borrowed one of its institutions, the public prosecutor, and grafted it upon the body of English (accusatorial) procedure embodied in the common law. Presumably, this innovation was brought about by the lack of lawyers, particularly in the

> newly settled regions, and by the increasing distances between the colonial capitals on the eastern seaboard and the ever-receding western frontier. Its result was that, at a time when virtually all but treason trials in England were still in the nature of suits between private parties, the accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court.

Ash, 413 U.S. at 308 (quoting F. Heller, The Sixth Amendment 20-21 (1951) (footnote omitted in original)).

The framers thus included the right to counsel "to minimize the imbalance in the adversary system that otherwise resulted with the creation of a *professional* prosecuting official." *Id.* at 309 (emphasis added); *see also, e.g., Johnson v. Zerbst*, 304 U.S 458, 462-63 (1938) (the right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented *by experienced and learned counsel*." (emphasis added)).

The right to counsel's foundation in the institution of the public prosecutor has constrained it ever since. Indeed, *Gideon v. Wainwright*, the parent of modern right-to-counsel jurisprudence, was unambiguous on this point: "Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. . . . That government hires lawyers to

prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). And ever since *Gideon*, the Court has consistently applied and understood the right to counsel in these terms. *See, e.g., Michigan v. Harvey*, 494 U.S. 344, 356-57 (1990) (Stevens, J., dissenting) (explaining that the Sixth Amendment thus "assures 'Assistance' at trial, when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor." (quoting *Ash*, 413 U.S. at 309) (emphasis added)); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (defense counsel counterbalances state prosecutors and thus "assure[s] fairness in the adversary criminal process"); *Brewer v. Williams*, 430 U.S. 387, 424-25 (1977) (Burger, C.J., dissenting) ("[T]he right to counsel is fundamentally a 'trial' right necessitated by the legal complexities of a criminal prosecution and the need to offset, to the trier of fact, the power of the State as *prosecutor*." (emphasis added)); *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

For this reason, the Court has never suggested that the right to counsel exists in civil cases with private parties on both sides. To the contrary, the Court has consistently limited the right to proceedings where the state is *both* a party *and* is represented by professional counsel. For example, in *Gagnon v. Scarpelli*, the Court held that parolees have no right to counsel at parole-revocation hearings.

411 U.S. 778, 787 (1973). The Court explained that because these hearings are informal and the state is not represented by a lawyer, the parolee has no right to counsel—even though he faces the possibility of detention. It contrasted revocation hearings, in which "the State is represented, not by a prosecutor, but by a parole officer," with criminal proceedings, in which "the State is represented by a prosecutor." *Id.* at 789. Indeed, the Court was concerned that if "counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel." *Id.* at 787. The proceedings would then "be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." *Id.* at 788.

The Court deployed similar reasoning in *Middendorf v. Henry*, which held that there is no right to counsel in summary court martial proceedings. 425 U.S. 25 (1976). In a summary court martial, there is no public prosecutor; instead "[t]he presiding officer acts as judge, factfinder, prosecutor, and defense counsel." *Id.* at 32. Indeed, the Court explained, "the adversary nature of civilian criminal proceedings is one of the touchstones of the Sixth Amendment's right to counsel." *Id.* at 40. The Court's holding that the accused had no right to counsel thus relied directly on the absence of a public prosecutor. *Id.* at 42.

Even more than parole-revocation proceedings or summary courts martial—both of which involve punishment, including imprisonment, imposed by the state—the right to publicly-funded counsel has no place in civil disputes between private parties. The

civil system would be upended if the state began selectively providing counsel to one side of a civil dispute. Indeed, selective provision of counsel would jeopardize the due process rights of the private litigants forced to square off against their opponent's state-funded counsel.

A court's use of civil contempt does nothing to change the character of purely-civil proceedings. Civil contempt is merely the mechanism through which *courts* police unruly litigants and enforce their orders. Civil contempt applies only after a neutral court concludes that a party has the ability, but has refused, to obey a lawful court order. *See, e.g.*, *United States v. Rylander*, 460 U.S. 752, 757 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question. . . . Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action."). The state does not bring civil contempt actions, nobody can be "convicted" of civil contempt, and the civil contemnor does not face a punitive, fixed punishment. Detention, if any, lasts only as long as is necessary to coerce the contemnor into complying with the court's orders. The contemnor thus "carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers*, 221 U.S. at 442 (quotation omitted). Throughout, his adversary remains a private litigant. In such circumstances, state-paid counsel should not be required.

2. Indeed, disputes over child support payments perfectly illustrate the danger of extending the right

to state-paid counsel to civil contempt proceedings. Inserting the right to counsel into child support disputes on behalf of delinquent parents would put their children and the custodial parents at an extreme disadvantage. As the Court knows, "lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views." *Gagnon*, 411 U.S. at 787. In the proceedings below, as in many child support enforcement proceedings, neither petitioner nor Ms. Rogers were represented by counsel. Ms. Rogers had to navigate the legal system without professional assistance to obtain a court order enforcing petitioner's child support obligations. Her task would have been exponentially more difficult—and more intimidating—if, once she made it to an enforcement hearing, she had to square off against zealous counsel provided and paid for by the state to represent petitioner.

The Court need look no further than its own precedent to see how far reaching the right to counsel would become if it were extended to all child support enforcement proceedings where there is a possibility of civil contempt and detention. The right to counsel means the right to effective counsel, which is much more than the right to have a lawyer physically present at trial. The right to effective counsel includes, to provide a few examples:

- the right to be informed by counsel of any deportation consequences that might arise from a plea agreement, *Padilla v. Kentucky*, 130 S. Ct.

1473, 1486 (2010) ("counsel must inform her client whether his plea carries a risk of deportation");

- the right to have counsel fully investigate the accused's background in search of potential defenses and mitigating factors, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("Counsel's conduct similarly fell short of . . . efforts to discover all *reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."); *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) ("The decision not to investigate did not reflect reasonable professional judgment.");
- the right to have counsel present mitigating evidence to the adverse party and the court, *Wiggins*, 539 U.S. at 524-25 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing." (quoting 1 ABA Standards for Criminal Justice 4-4.1, commentary, 4-55 (2d ed. 1982)); and
- the right to be informed of the various advantages and disadvantages that come with a plea agreement, *Libretti v. United States*, 516 U.S. 29, 50 (1995).

It is difficult to imagine how the contours of effective counsel would be imported into the child support enforcement context. If delinquent parents receive the same right to counsel as criminal defendants, each delinquent parent's state-funded lawyer would, at the least, have to ferret out all available evidence of the delinquent parent's inability to pay child support. And because counsel's sole obligation would be to his client, counsel would only

uncover and produce information that helps the delinquent parent. The pro se mother, meanwhile, would be left to muster any contrary evidence on her own.

Further, the Court has consistently held that an integral component of the right to counsel is "the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004). Presumably the "all critical stages" concept would also be imported into child support enforcement proceedings. That then raises the question of what constitutes a "critical stage" in a civil contempt proceeding for failure to pay child support. One critical stage in criminal proceedings is a plea negotiation, *see, e.g., Padilla*, 130 S. Ct. at 1486 ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."), which is analogous to a settlement conference in a civil case. Both discussions, if they fail, lead to an enforcement proceeding.

Thus, if a delinquent parent facing the prospect of civil detention has the right to counsel, he also presumably has the right to counsel's assistance in negotiating away his past-due child support in a private settlement with the custodial parent. And if the state fails to provide counsel to the delinquent parent at this "critical stage" then its courts will be forever barred from detaining him for civil contempt. *See Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (holding that a state may never imprison a defendant, even for a probation violation, unless he was provided with counsel at his original proceeding). Petitioner's

rule would therefore not only require state-funded counsel to defend delinquent parents at enforcement proceedings, but would entitle them to the assistance of professional negotiators in haggling away past-due child support obligations. All this while pro se custodial parents are forced to muddle through the system on their own.

Further, even the core of the right to counsel that petitioner requests—representation at the contempt proceeding itself—would put pro se custodial mothers like Ms. Rogers at a serious disadvantage. Inability to comply with the court's order is the only defense to civil contempt. In child support cases, the only reason a delinquent parent would be unable to comply with the court's order would be his inability to pay the past-due child support. Yet that precise question—whether the delinquent parent can pay his child support—is the *only issue* in the entire proceeding. If the noncustodial parent can afford to pay but has not paid, then the court will order him to pay. If the noncustodial parent is unable to pay, by contrast, there is nothing the court can do. Delinquent noncustodial parents facing the prospect of detention-by-contempt would, therefore, effectively receive state-appointed counsel to persuade the court to clear out their *entire debt* of past-due child support.

In addition to making it easier for delinquent noncustodial parents to clear out their arrearage, petitioner's proposed rule would give noncustodial parents an extra incentive not to pay child support in the first place. Once noncustodial parents realize that not paying child support will lead to an enforcement proceeding in which they receive state-appointed counsel to advocate for their inability to

pay, many will (understandably) relish the prospect of going to court. They might as well roll the dice and hope that their state-funded lawyer is able to persuade the court to release them from their past-due obligations (and possibly future ones, too). After all, if they lose at the enforcement proceeding, they still only owe whatever is past-due. Nothing lost, nothing gained, as far as the delinquent parent is concerned.

3. This case exemplifies the already-endemic problem of delinquent parents who refuse to pay until forced to by the court. Petitioner has consistently refused to pay child support until coerced by detention. In June 2003, petitioner and Ms. Rogers agreed to an Order of Responsibility under which petitioner would pay approximately $50 in child support each week. Pet. App. 19a, 22a. But despite having consented to the order, petitioner immediately stopped paying child support and fell behind by over $760. Ms. Rogers was forced to haul petitioner to family court, which informed petitioner that he had 90 days to clear out his obligation or he would be jailed for contempt of court. Only then, after petitioner was facing the threat of detention, did he make four payments to Ms. Rogers totaling nearly $1100, clearing his debt and avoiding jail. Pet. App. 131a.

That pattern repeated for the next few years. Petitioner routinely refused to pay child support until Ms. Rogers dragged him to court and obtained a court order. In February 2004, petitioner was nearly $400 behind on his child support, so Ms. Rogers went to court and obtained an order holding petitioner in civil contempt and sending him to jail unless he paid his

debt. Pet. App. 23a-25a. After spending a couple of days in jail, petitioner paid all of his past-due child support and he was immediately released. Resp. Br. 11. This sequence of events repeated in October 2004 and February 2005. *Id.* The only change in petitioner's behavior was in February 2005, when he no longer tested the court's willingness to enforce its contempt finding with actual detention. After that finding of civil contempt (petitioner's fourth), he paid just before he was jailed. *Id.* If this is what it took for Ms. Rogers to obtain $50 per week, imagine her burden if, at each proceeding, she were required to face state-funded counsel.

Ms. Rogers is hardly alone in her frustrating effort to obtain child support payments. Much of the billions of dollars in child support past-due nationally is owed by noncustodial parents who are perfectly capable of paying their debts. "42 percent of nonresident fathers did not pay formal child support and had no apparent financial reason to shirk this responsibility." Elaine Sorenson & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 Soc. Serv. Rev. 420, 422 (2001). Indeed, many noncustodial parents could pay substantially more than courts currently order them to pay. *See, e.g.*, Maureen A. Pirog & Kathleen M. Ziol-Guest, *Child Support Enforcement: Programs and Policies, Impacts and Questions*, 25 J. Pol'y Analysis & Mgmt. 943, 973 (2006) (reviewing empirical studies).

Further, a study commissioned by the Michigan Supreme Court found that delinquent parents do whatever they can to conceal income. That study concluded that many delinquent parents "opt to work in the underground economy at least in part because

doing so enables them to shield their earnings from child support enforcement efforts." *Underground Economy*, *supra*, at 10. This only hurts the children because, as the study explained, they "absorb the deficit by doing without essentials that their parents should provide." *Id.*

Delinquent parents who work in the underground economy and conceal income will almost always resist efforts to collect child support. If the custodial parent calls the recalcitrant parent to demand payment and the income-hiding parent claims that he cannot pay, then civil contempt backed by the possibility of detention may be the *only* tool a family court possesses to shake the money loose. Providing state-funded counsel to represent these delinquent parents would gum up the process and put indigent custodial parents at an extreme disadvantage.

4. One of petitioner's *amici*, the National Association of Criminal Defense Lawyers, argues that, contrary to the above, providing counsel to delinquent parents in child support proceedings will have little-to-no measurable effect. It claims that "[e]ven in states where a right to counsel for indigents facing incarceration for civil contempt has been recognized, often the right is unenforced." NACDL Br. at 28. NACDL points to Pennsylvania, which recognized a right to counsel in civil contempt proceedings in *Commonwealth ex rel. Brown v. Hendrick*, 283 A.2d 722, 723-24 (Pa. Super. Ct. 1971). It notes that despite the court's holding in *Hendrick*, Pennsylvanians' right to counsel is not being consistently enforced, as evidence by a petition for relief filed with the Pennsylvania Supreme Court by

eighteen individuals denied access to counsel in Berks County. NACDL Br. at 28-29.

Some of the academic research cited by another of petitioner's *amici* found that "[i]n many of the courtrooms we watched, these attorneys would call out their client's name as the court room filled with cases, meeting the client for the first time just prior to the hearing." Rebecca May & Marguerite Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices, Center for Family Policy & Practice*, at 45 (2005) *available at* http://www.cffpp.org/ publications/LookAtArrests.pdf) (last checked January 27, 2011). Thus, the authors concluded:

> For many noncustodial parents, however, the costs add to an existing burden without a tangible gain. Lawyers with a high turnover in cases who have little time to get to know their clients stand little chance of building a case that could persuade a judge to be lenient, even when the facts of the case might merit leniency.

Id.

Petitioner's *amici's* claim that affording a right-to-counsel in civil child support disputes will be costless in practice is wrong, as explained above and in Part II, below. But if the picayune right that these *amici* describe is all petitioner seeks here, then petitioner's demand for counsel is truly senseless. It would accomplish nothing to require states to provide counsel that sit in family court all day and periodically stand at a lectern—clueless about the facts, having met their client five minutes prior—in order to "represent" the delinquent parent during his

contempt hearing. Such a requirement would impose a major expense on already-cash-strapped states, without making the proceeding any fairer or more accurate. It would be formalism at its worst—a meaningless, costly rule that yields no discernable gain.

Petitioner, however, is obviously not asking for such an empty right. Instead, he is seeking to extend the right to counsel currently available in *criminal* proceedings to *this* case—a civil contempt proceeding to enforce a child support obligation. And under *that* right, Ms. Rogers, the custodial parent here, would be put at an extreme disadvantage, ultimately to the detriment of their child.

5. Accordingly, petitioner's request that this Court extend the right to counsel to civil contempt proceedings for the enforcement of child support payments should be denied.

II. CIVIL CONTEMPT WITH THE THREAT OF INCARCERATION IS A HIGHLY-EFFECTIVE ENFORCEMENT TOOL THAT STATES WILL NO LONGER BE ABLE TO USE IF IT IS ENCUMBERED WITH THE RIGHT TO COUNSEL.

In addition to making it harder for pro se mothers to collect child support, creating a right to counsel in civil contempt cases would impermissibly interfere with state and congressional policy choices. Federalism requires that states be permitted to make reasonable policy choices in pursuit of permissible goals. "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal

constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

Congressional policy choices also deserve respect. "[I]t is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 240 (1986) (Powell, J., concurring in part and dissenting in part). On disputed questions of policy, it is the role of Congress, not the courts, "to decide which policy choice is the better one." *Arkansas v. Oklahoma*, 503 U.S. 91, 114 (1992).

Both of these fundamental principles militate in favor of affirming the Supreme Court of South Carolina. Civil contempt backed by the threat of detention is a powerful tool for collecting child support from unwilling noncustodial parents. Encumbering this policy tool—which is used by many states and has the imprimatur of Congress—with a categorical right to counsel will undermine its effectiveness and, in many states, lead to its elimination.

1. Many states use civil contempt backed by the threat of detention as a tool for collecting child support from the most recalcitrant noncustodial parents. This tool has proven highly effective at shaking money loose from noncustodial parents who otherwise would not pay a cent. Although few contemnors are ever actually jailed, the possibility of jail is a key component of the system. And for some delinquent parents, a few days of detention are required before they will relent and honor their child support obligations.

The Department of Health and Human Services's Office of Child Support Enforcement recently

compiled the results of a survey of state child support enforcement authorities. The survey confirms both that civil contempt is a frequently used and highly effective tool for collecting child support. Of the 18 states that responded to the survey, which is attached as Appendix A,[2] all but one reported that they use civil contempt to enforce child support orders. And the only state that did not report use of civil contempt, South Dakota, uses "Order to Show Cause" hearings which result in some noncustodial parents being jailed.

Most of the states provided detailed responses, which shed light on the effectiveness of civil contempt backed by the threat of detention:

- Colorado uses civil contempt in a tiny fraction of its cases—typically about 2400 delinquent parents are held in contempt out of around 125,000 child support enforcement cases (approximately 2%). *Amici* App. 2a. The Colorado authorities were not sure what portion of this 2% actually spend time in jail, "but it is quite low"; contempt is typically used only after less restrictive actions fail. *Id.* Colorado's authorities "believe it can be an effective tool with certain obligors" and finds that it fits "nicely into a problem-solving court concept." *Id.* at 3a.

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[2] The attached table was prepared using an excel spreadsheet that was created by the Office of Child Support Enforcement to collect responses to a survey conducted by the National Council of Child Support Directors. The content of the attached table is identical to the Office of Child Support Enforcement's spreadsheet.

- Connecticut uses civil contempt "routinely when the obligor is 30 days delinquent" and "more often when income withholding is not an appropriate remedy." *Amici* App. 3a. But like in Colorado, the percentage of contemnors who actually go to jail "is not large" because—just like petitioner after his first four child support enforcement proceedings in South Carolina—"most will pay a purge amount in settlement rather than go to jail." *Id.* at 4a.
- Florida uses contempt on a much wider scale. In fiscal year 2009-10, its enforcement authorities "filed over 59,000 motions for contempt." *Amici* App. 4a. Florida reports that child support payments total 200% to 400% of the total state funds invested in enforcement. *Id.* at 4a-5a.
- Illinois and Indiana, for their part, routinely rely on civil contempt to collect past-due child support. Neither, however, systematically provides counsel to the delinquent parent. As Indiana's enforcement authorities explained, counsel is provided in only "a very low number of cases." *Amici* App. 5a-6a.
- Kentucky reports that it "often" uses civil contempt proceedings to enforce noncustodial parents' child support obligations. *Amici* App. 6a. It further reports that civil contempt "is a highly effective collection tool." *Id.* at 7a.
- Massachusetts, like most of the other states, uses detention-backed civil contempt for only a small number of cases. It reports that only "5-6% of the obligated cases" are "brought on civil contempt" with "about 5% go[ing] to jail." *Amici* App. 7a. This tool—which is reserved for the worst

offenders—is highly effective, yielding collections of about "$2 million/year in lump-sum payments." *Id.*

- Minnesota reports that use of civil contempt to collect past-due child support is "common but not routine." *Amici* App. 7a. But like in South Carolina, "findings of contempt are stayed to allow the [non-custodial parent] to purge the finding by making payments" which means, in practice, that it "is uncommon for someone to be put in jail." *Id.* And like the other states, Minnesota has "found that collections increase after findings of contempt." *Id.*
- Oklahoma uses civil contempt only as "a last ditch remedy." *Amici* App. 9a. It has found that civil contempt "is effective when nothing else will work and the [noncustodial parent] is working for cash in the underground economy." *Id.*
- Oregon uses civil contempt backed by occasional detention to collect child support in some of its counties. Those counties have found that when they "combine contempt actions with a problem solving approach" there has been "a 200% increase in collection." *Amici* App. 10a. Further, although Oregon does not collect detailed data, it has observed "a ripple effect in communities with contempt programs that suggests an increase in collections" generally. *Id.*
- Texas, like the other states, uses detention only as a last resort. It is within "the circuit court judge's discretion whether to impose jail time if the [noncustodial parents] do not comply with the court's order after being provided an opportunity to purge themselves of a contempt finding." *Amici*

App. 12a. Actual jailing, however, is hardly "routine," as noncustodial parents "are provided multiple opportunities to comply with the order before jail time may be imposed, and some judges are more reluctant than others to place NCPs in jail." *Id.*

- Utah likewise uses civil contempt as an enforcement tool, "but the number of people who go to jail is very small." *Amici* App. 12a. There too, the courts use detention only "as a last resort after all administrative and judicial remedies have failed." *Id.* at 13a.
- Virginia uses "civil contempt as a last resort to collect past-due child support after all other enforcement mechanisms have been exhausted." *Amici* App. 13a. Whether indigent parents are provided with court-appointed counsel "varies by jurisdiction." Of Virginia's 359,000 cases involving over 440,000 children, only 3,300 noncustodial parents (less than 1% of the total caseload) were found in civil contempt and sentenced to confinement with a purge clause. *Id.* This procedure has proven extremely effective, with noncustodial parents paying "approximately $13 million either before a court hearing to avoid a contempt finding or after a court hearing to purge the contempt finding and either avoid" being sent to jail or are "released from jail." *Id.* at 13a-14a.

The survey also provides a preview of what is likely to happen if the Court creates a categorical right to counsel in civil contempt proceedings backed by possible detention. Nearly five years ago, the New Jersey Supreme Court held "that the Fourteenth

Amendment Due Process Clause mandates the appointment of counsel to assist parents found to be indigent and facing incarceration at child support enforcement hearings." *Pasqua v. Council*, 892 A.2d 663, 674 (N.J. 2006). New Jersey—which, like many states, is facing serious budgetary problems in the wake of the greatest economic crisis since the Great Depression—has been unable to fund a costly new counsel program for delinquent parents. As New Jersey officials explained in their survey response, "we are required to do an assessment of indigence once the individual is arrested and if [they are] found to be indigent then they are released. There has been no ability to fund a representation program and pro bono was denied." *Amici* App. 8a. The New Jersey Supreme Court's creation of a categorical right to counsel thus forced the state to stop using this effective enforcement tool.

This survey confirms that civil contempt is a powerful tool to ensure compliance with child support orders. In these proceedings, delinquent parents are rarely imprisoned. But the mere *threat* of imprisonment is a highly effective tool for ensuring that parents who a court concludes *can* pay to support their children actually *do* pay. If the Court creates a constitutionally-recognized right to counsel at the national level, then countless states will doubtless follow New Jersey's lead and abandon this powerful tool, ultimately to the detriment of poor mothers and children throughout the country.

2. The Court is also obliged to give deference to congressional choices, particularly when those choices are made in the context of a comprehensive federal-state regulatory framework like child support

enforcement. As the Solicitor General's brief explains at pages 29-32, Congress has consistently refused to fund counsel for delinquent noncustodial parents in child support enforcement proceedings despite its awareness that states regularly use detention as an enforcement tool. *See, e.g.*, S. Rep. No. 98-387, at 23 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2420 (statute does not provide federal funding for "defense counsel for absent parents" or "incarceration of delinquent obligors"); Expenditures For Which Federal Financial Participation Is Not Available, 45 C.F.R. § 304.23 (i) and (j) (no federal funding for "[t]he costs of counsel for indigent defendants in IV-D actions" or "[a]ny expenditure for jailing of parents in child support enforcement cases"); Prohibition of Federal Funding of Costs of Incarceration and Counsel for Indigent Absent Parents, 52 Fed. Reg. 32,130 32,130 (Aug. 26, 1987) (Federal "policy since the inception of the [Title IV-D] program has been that costs of incarceration of delinquent obligors and costs of defense counsel are not necessary and reasonable costs associated with the proper and efficient administration of the Title IV-D program.").

Amici Curiae Members of Congress agree with the Solicitor General that the Court should respect "the balance struck by Congress and the Secretary in enacting and administering the Title IV-D program." S.G. Br. at 29 (citing *Middendorf*, 425 U.S. at 43 ("[W]e must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8, that counsel should not be provided in summary courts-martial."); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 ("This deference to congressional judgment must be afforded

even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment.")). The Court should thus reject petitioner's request for a categorical right to counsel in civil contempt proceedings whenever there is a possibility of detention.

III. THE COURT SHOULD DECLINE TO OVERRULE LONG-SETTLED PRECEDENT DISTINGUISHING BETWEEN CIVIL AND CRIMINAL CONTEMPT.

Finally, creating a categorical right to counsel in civil contempt proceedings whenever there is a possibility of detention would erase the established line between civil contempt and criminal contempt and would require overturning a line of precedent that dates back to *Gompers*, 221 U.S. at 442. The Court should decline to overrule these cases, which have proved logical and workable for over a century. *See, e.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1612 (2010) ("[I]n the context of stare decisis, this Court has suggested precedents tend to gain, not lose, respect with age.").

Criminal contempt "is a crime in the ordinary sense" and its sanctions are "criminal penalties" that "may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *United Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994). Sanctions for *civil* contempt, however, are "designed to compel future compliance with a court order," "are considered to be coercive and avoidable through obedience, and thus may be imposed in an *ordinary civil proceeding* upon notice and an opportunity to be

heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Id.* at 827 (emphasis added). Indeed, *Bagwell* went so far as to describe someone exactly like petitioner—a former spouse who refuses to live up to his legal obligations—as the paradigmatic civil contemnor: "The paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor indefinitely until he complies with an affirmative command such as an order '*to pay alimony* . . . .'" *Id.* at 828 (quoting *Gompers*, 221 U.S. at 442) (emphasis added).

Not only has the Court always carefully distinguished civil contempt from criminal contempt, it has even done so in the precise context presented by this case. In *Hicks ex rel. Feiock v. Feiock*, respondent was a noncustodial parent with a history of sporadic payment of child support. 485 U.S. 624, 627 (1988). Like Ms. Rogers, the custodial parent took her former husband to court to enforce his child support obligations. *Id.* And like the South Carolina family court below, the court informed the noncustodial parent that if he did not begin making monthly child support payments, he would be held in contempt of court and jailed. *Id.*

The noncustodial parent continued to miss his child support payments, so his former wife again took him to court. There, she "made out a prima facie case of contempt against respondent by establishing the existence of a valid court order, respondent's knowledge of the order, and respondent's failure to comply with the order." *Id.* The noncustodial parent failed to prove inability to pay and was sentenced to a 25-day jail sentence, which was suspended on the condition that he not miss any more child support

payments. *Id.* at 628. Respondent appealed, arguing that because the contempt proceeding was effectively criminal in nature, California's evidentiary presumption that the noncustodial parent is able to pay his child support violated his due process rights. *Id.* (citing Cal. Civ. Proc. Ann. § 1209.5 (West 1982)).

The Court rejected respondent's argument. First, it explained that "state law provides strong guidance about whether or not the State is exercising its authority 'in a nonpunitive, noncriminal manner,'" such that "one who challenges the State's classification of the relief imposed as 'civil' or 'criminal' may be required to show 'the clearest proof' that it is not correct as a matter of federal law." 485 U.S. at 631 (quoting *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986)). That showing must be made, the Court continued, by looking at the type of relief the state granted. If "the relief provided is a sentence of imprisonment," then "it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order,' and is punitive if 'the sentence is limited to imprisonment for a definite period.'" *Id.* at 632 (quoting *Gompers*, 221 U.S. at 442). The touchstone, the Court concluded, is whether the penalty is conditional or unconditional. A conditional penalty is civil "because it is specifically designed to compel the doing of some act." *Id.* at 633.[3]

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[3] In support of this statement, which the Court considered to be beyond dispute, it included the following citations: *Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947); *Eylander*, 460 U.S. 752; *Nye v. United States*, 313 U.S. 33 (1941); *Fox v. Capital Co.*, 299 U.S. 105 (1936); *Lamb v. Cramer*, 285 U.S. 217 (1932); *Oriel v. Russell*, 278 U.S. 358 (1929); *Ex parte Grossman*, 267 U.S. 87

Bearing these principles in mind, the Court held that the "Due Process Clause" does "not necessarily prohibit the State from employing" a rebuttable presumption that a delinquent parent is able to comply with a court order requiring him to pay child support, so long as "respondent would purge his contempt judgment by paying off his arrearage." *Id.* at 640. It noted that in a criminal proceeding "such a statute would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt," whereas in a civil contempt proceeding—defined as any proceeding where the contemnor can purge the contempt finding by paying his arrearage—the statute "would be constitutionally valid." *Id.* at 637-38.

The Court's holding in *Hicks* controls this case. Petitioner's detention was conditional. He could purge his contempt at any time by paying off his arrearage—just as he did the four previous times he was held in contempt. He therefore was not, as *Hicks* says, entitled to the protections reserved for criminal proceedings.

Indeed, Justice O'Connor, writing for the three dissenting justices in *Hicks* (who agreed with the general analysis but disagreed about remanding to the California courts) was even more adamant about enforcing the line between criminal contempt and civil contempt in child support enforcement proceedings:

(footnote continued)

(1925), *Doyle v. London Guarantee Co.*, 204 U.S. 599 (1907), *In re Christensen Engineering Co.*, 194 U.S. 458 (1904), *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904).

> Contempt proceedings often will be useless if the parent seeking enforcement of valid support orders must prove that the obligor can comply with the court order. The custodial parent will typically lack access to the financial and employment records needed to sustain the burden imposed by the decision below, especially where the noncustodial parent is self-employed, as is the case here. Serious consequences follow from the California Court of Appeal's decision to invalidate California's statutory presumption that a parent continues to be able to pay the child support previously determined to be within his or her means.

485 U.S. at 644-45 (O'Connor, J., dissenting with Rehnquist, C.J., and Scalia, J.). Likewise, custodial parents will "typically lack access to the financial and employment records needed" to resist professional counsel provided for delinquent parents "especially where" the custodial parent is pro se, "as is the case here." *Id.* In short, "[s]erious consequences" would "follow" from creating a categorical right to counsel in civil contempt cases where there is a possibility of detention. *Id.*

Petitioner provides no policy rationale or legal basis even arguably compelling enough to justify discarding the distinction between civil and criminal contempt and overturning *Bagwell*, *Hicks*, *Gompers*, and the many cases cited therein. In particular, petitioner has not demonstrated why the Court should take such a dramatic step to provide delinquent noncustodial parents with state-funded counsel to resist pro se mothers trying to collect past-due child support. Doing so would only hurt indigent

children, for whom that support is a crucial "lifeline." 155 Cong. Rec. at S10705-06 (statements of Senators Kohl and Rockefeller).

CONCLUSION

The decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

COMPENDIUM OF RESPONSES COLLECTED BY THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF CHILD SUPPORT ENFORCEMENT (DECEMBER 28, 2010)

The below table is adapted from a spreadsheet compiled by the U.S. Department of Health and Human Services Office of Child Support Enforcement (OCSE). The spreadsheet contains responses by many states' child support enforcement authorities to a survey distributed through the National Council of Child Support Directors' listserv. The OCSE informed undersigned counsel that it did not conduct the survey itself and has not verified the responses.

The table below reproduces the content of OCSE's spreadsheet verbatim.

State	Response to NCCSD Listserv
Alabama	Uses civil contempt as an enforcement tool; Noncustodial indigents facing contempt where incarceration is a possibility has a right to an attorney. It's uncertain how many of them accept the service; Amount collected from low income obligors is unknown. Statistics on effectiveness not available.
Alaska	No Response
Arizona	No Response
Arkansas	No Response
California	No Response

State	Response to NCCSD Listserv
Colorado	We do use contempt as an enforcement tool in Colorado. We process about 2400 contempts per year out of around 125,000 ordered cases. While this works out to a contempt rate of 2%, it is probably a bit lower given that we have cases opening and closing throughout the year, thus the denominator is greater than 125,000. The courts typically will not order legal representation for the obligor in the case of a remedial contempt action as it does not involve jail time. However, if the county files a punitive contempt action that can lead to jail time, the courts will order public representation in appropriate cases, as the obligor may lose his/her freedom. We don't have any statistics on the number that go to jail, but it is quite low; some Magistrates order ankle-bracelets and other less restrictive actions. We also don't have demographic or collection statistics. Given that our Magistrates have quite a bit of latitude in the contempt process, the effectiveness of this remedy depends in large part on the actions and attitude of the

State	Response to NCCSD Listserv
	Magistrate, as well as case preparation. Thus, it is quite effective in some jurisdictions, less so in others, and a challenge in some. We believe it can be an effective tool with certain obligors, thus we try to showcase best practices with regard to contempts and to educate the magistrates on their use. Our CSE Judicial Liaison who works out of State Judicial, and thus is considered one of "them", has been very active in persuading and proselytizing in this regard. The contempt [sic] can fit nicely into a problem-solving court concept.
Connecticut	In your state, do you use civil contempt as an enforcement tool? Yes. If yes, can you provide information on how often it is used? It is used routinely when the obligor is 30 days delinquent, more often when income withholding is not an appropriate remedy. For example – what percent of your caseload is brought on civil contempt? Whenever there is a delinquency, our cooperating agency within the Judicial Branch issues a standard form which requests all appropriate remedies including contempt, license suspension,

State	Response to NCCSD Listserv
	withholding, etc. Are any given publicly-funded representation? Yes, if indigent. What percent go to jail? Don't have exact percentage, but it is not large; most will pay a purge amount in settlement rather than go to jail. What are the demographic characteristics (incomes) of those brought on civil contempt? Across the board – it is the standard practice if income withholding doesn't work. How much do you collect from low income obligors who are brought on civil contempt and do you have statistics on the effectiveness of civil contempt procedures for collecting support from low income obligors? No.
Delaware	No Response
District of Columbia	No Response
Florida	In your state, do you use civil contempt as an enforcement tool? Yes If yes, can you provide information on how often it is used? In FFY 09/10 [sic] we filed over 59,000 motions for contempt Are any given publicly-funded representation? No, Florida is one of the few states that does not provide representation to the obligor. How much do you collect from low income obligors who are

State	Response to NCCSD Listserv
	brought on civil contempt and do you have statistics on the effectiveness of civil contempt procedures for collecting support from low income obligors? Florida return [sic] on investment for this enforcement tool varies by circuit. In general it can from [sic] $2.00 to $4.00 for each dollar spent by the program. We are in the process of completing a detailed analysis by county, which should be completed by the end of January.
Georgia	No Response
Guam	No Response
Hawaii	No Response
Idaho	No Response
Illinois	In your state, do you use civil contempt as an enforcement tool? Yes, through [sic] it is not our primary tool. If yes, can you provide information on how often it is used? No statistics are readily available. For example – what percent of your caseload is brought on civil contempt? Not readily available. Are any given publicly-funded representation? Not to my knowledge, though different court units have different approaches. In Cook County, there is a not-for-profit attorney-staffed help desk for parents to use. What percent

State	Response to NCCSD Listserv
	go to jail? Unknown, though the IV-D Agency has made it clear that jailing of low-income fathers is not the goal of the IV-D program. What are the demographic characteristics (incomes) of those brought on civil contempt? Unknown. How much do you collect from low income obligors who are brought on civil contempt and do you have statistics on the effectiveness of civil contempt procedures for collecting support from low income obligors? Unknown, through accedotally [sic] we do not find that contempt generates significant collections in most cases. There are some exceptions, where the part is in arrears [sic]
Indiana	In your state, do you use civil contempt as an enforcement tool? YES Are any given publicly-funded representation? YES, BUT ONLY ON A VERY LOW NUMBER OF CASES.
Iowa	No Response
Kansas	No Response
Kentucky	In response to the e-mail regarding civil contempt proceedings as an enforcement tool, we do use this tool often. In some of the cases a GAL is appointed and paid for with state public funds. However, we

State	Response to NCCSD Listserv
	do not have the ability to provide you with the statistical data you ask for. Based on our experience, it is a highly effective collection tool used by the majority of the county attorneys under contract to the CSE program.
Louisiana	No Response
Maine	No Response
Maryland	No Response
Massachussetts	5-6% of the obligated caseload is brought on civil contempt; about 5% go to jail. We have collections on all contempts not necessarily low-income obligors [sic] – we collect about $2 million/year in lump-sum payments. *Additional Data Provided*
Michigan	No Response
Minnesota	In MN we use contempt as an enforcement [sic]. I would describe its use as common but not routine. Typically, findings of contempt are stayed to allow the NCP to purge the finding by making payments. It is uncommon for someone to be put in jail. I do not have answers to the specific questions below. We have found that collections increase after findings of contempt.
Mississippi	No Response
Missouri	No Response
Montana	No Response

State	Response to NCCSD Listserv
Nebraska	No Response
Nevada	No Response
New Hampshire	No Response
New Jersey	Civil contempt is used as an enforcement took [sic], as a result of a lawsuit several year ago [sic] (March 8, 2006, the Supreme Court in Pasqua v. Council, 186 N.J. 127 (2006) ("Pasqua")) we are required to do an assessment of indigence once the individual is arrested and if found to be indigent then they are released. There has been no ability to fund a representation program and pro bono was denied. In the state of New Jersey, constitutional authority provides sheriff officers with arrest authority on civil warrants. The child support program mandates, under NJ Court Rule, civil warrants can be issued on child support cases for failure to appear, comply and failure to pay child support, as ordered by the court. In FFY10, NJ issued approximately 40,300 warrants statewide. In FFY10, the Sheriff Child Support Warrant Program executed 28,600 warrants statewide.

State	Response to NCCSD Listserv
	In FFY10, the Sheriff Child Support Warrant Program resulted in statewide child support collections of approx $13.73 million dollars. In FFY10, the Sheriff Child Support Warrant Program conducted two (2) statewide child support sweeps resulting in 1,900 warrant executions totaling approximately $490k in collections. In FFY10, approximately $1.5 million dollars was reimbursed statewide to county general funds to offset the administrative costs of the program.
New Mexico	No Response
New York	No Response
North Carolina	No Response
North Dakota	No Response
Ohio	No Response
Oklahoma	OK uses civil contempt as a last ditch remedy and believes it is effective when nothing else will work and the NCP is working for cash or in the underground economy. However, we do not have statistical information on this type of remedy in our system.
Oregon	In your state, do you use civil contempt as an enforcement tool? Yes If yes, can you provide information on how often it is used? Unknown For example

State	Response to NCCSD Listserv
	what percent of your caseload is brought on civil contempt? Are any given publicly-funded representation? Yes if incarceration is plead [sic] as a potential remedy What percent go to jail? Unknown What are the demographic characteristics (incomes) of those brought on civil contempt? Unknown How much do you collect from low income obligors who are brought on civil contempt and do you have statistics on the effectiveness of civil contempt procedures for collecting support from low income obligors? We do not isolate results based upon income. When we combine contempt actions with a problem solving approach we have seen a 200% increase in collection. Counties who have contempt programs that do not have a specific problem solving element also see an increase in collection but we don't currently have hard data on that. There is also a ripple effect in communities with contempt programs that suggests an increase in collections
Pennsylvania	No Response
Puerto Rico	No Response
Rhode Island	No Response
South Carolina	In your state, do you use civil

State	Response to NCCSD Listserv
	contempt as an enforcement tool? Yes. If yes, can you provide information on how often it is used? South Carolina does not capture that information. For example - what percent of your caseload is brought on civil contempt? Are any given publicly-funded representation? None. What percent go to jail? What are the demographic characteristics (incomes) of those brought on civil contempt? South Carolina does not capture that information. How much do you collect from low income obligors who are brought on civil contempt and do you have statistics on the effectiveness of civil contempt procedures for collecting support from low income obligors? South Carolina does not capture that information.
South Dakota	Unfortunately, we do not have the capability to track all of the demographics and income statuses of the individuals that are summoned to appear in court for Order to Show Cause hearings and/or the actual number that are placed in custody. We did have 3,900 successful show cause enforcement actions in the last year (this may include multiple actions against the same NCP),

State	Response to NCCSD Listserv
	but I can not [sic] tell you the number of NCPs that had been jailed from that figure. We have 43,000 active cases.
Tennessee	No Response
Texas	Cause actions to be heard by the circuit court. It is the circuit court judge's discretion whether to impose jail time if the NCPs do not comply with the court's order after being provided an opportunity to purge themselves of a contempt finding. I would not characterize the actual jailing of NCPs as "routine" – typically NCPs are provided multiple opportunities to comply with the order before jail time may be imposed, and some judges are more reluctant than others to place NCPs in jail.
Utah	Civil contempt is used as an eforcement tool [sic], but the number of people who go to jail is very small. One thing to keep in mind is that the decision to find a non-custodial parent in contempt is exclusively in the hands of the district court judges. It is our office's preference to not have people spend time in jail for not paying their child support obligations, but for some it is the only enforcement remedy that is left. Typically, the court uses this

State	Response to NCCSD Listserv
	as a last resort after all administrative and judicial remedies have failed
Vermont	No Response
Virgin Islands	No Response
Virginia	"The Virginia Division of Child Support Enforcement does use civil contempt as a last resort to collect past-due child support after all other enforcement mechanisms have been exhausted. The Division's caseload includes more than 359,000 cases involving over 440,000 children. In 2010, the Division filed approximately 61,390 court pleadings, which included 33,884 motions for show cause (55% of total pleadings). Roughly 3,300 noncustodial parents (10% of the show cause actions and less than 1% of the Division's caseload) were found in civil contempt and sentenced to confinement with a purge clause. In those cases, courts ordered approximately 725,230 total jail days; however, the number of days actually served was significantly lower as the majority of individuals paid the purge amount. Noncustodial parents paid approximately $13 million either before a court hearing to avoid a contempt finding or after a court

State	Response to NCCSD Listserv
	hearing to purge the contempt finding and either avoid or be released from jail. Whether indigent noncustodial parents are provided court-appointed counsel in contempt actions varies by jurisdiction. Approximately 60% of jurisdictions provide court-appointed counsel. The Division does not have data correlating income and civil contempt actions."
Washington	No Response
West Virginia	No Response
Wisconsin	No Response
Wyoming	In Wyoming, we use civil contempt as an enforcement tool. We are a judicial state, so all contempt actions are decided by a District Court judge. We do not keep any statistics on civil contempt. I would be able to give you anecdotal information only.
	No Response
	No Response
	No Response

AMICUS CURIAE BRIEF

12

FILED

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No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA; CHILDREN'S LAW CENTER; DC APPLESEED CENTER FOR LAW AND JUSTICE; AND THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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648

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY	4
ARGUMENT	8
I. THERE IS A HIGH RISK OF ERROR WHEN INDIGENT PARENTS ARE HELD IN CIVIL CONTEMPT AND INCARCERATED FOR FAILURE TO PAY CHILD SUPPORT	8
A. Individuals Who Fail To Make Child Support Payments Often Lack The Resources And Skills Necessary To Make Required Payments	9
B. Indigent Parents Are Often Unable To Present A Cogent Defense In Civil Contempt Proceedings Without The Assistance Of Counsel	14
II. PROVIDING COUNSEL IN CIVIL CONTEMPT PROCEEDINGS ENHANCES THE FAIRNESS AND EFFICIENCY OF CHILD SUPPORT ENFORCEMENT	18
A. Guaranteeing Counsel In Civil Contempt Proceedings Benefits All Participants In The Child Support System	18
B. Providing Counsel To Alleged Civil Contemnors Will Not Prejudice Unrepresented Custodial Parents	25

TABLE OF CONTENTS—continued

Page

III. RESOURCE CONSTRAINTS DO NOT JUSTIFY DENYING THE RIGHT TO COUNSEL 28

CONCLUSION 34

TABLE OF AUTHORITIES

CASES — Page

Alabama v. *Shelton*, 535 U.S. 654 (2002).... 29
Argersinger v. *Hamlin*, 407 U.S. 25 (1972)..... 18, 20, 32
Bearden v. *Georgia*, 461 U.S. 660 (1983)..... 19
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Hicks v. *Feiock*, 485 U.S. 624 (1988)..... 17
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D.C. Code § 11-2602 (2001)..... 16
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TABLE OF AUTHORITIES – continued

Page

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75 Fed. Reg. 45,628 (Aug. 3, 2010) 17

RULES

ABA Model R. of Prof'l Conduct 2.1 ..... 24, 25
D.C. R. of Prof'l Conduct 2.1 25
S.C. Fam. Ct. R. 24 26
S.C. R. of Prof'l Conduct 2.1 25
S.C. Sup. Ct. R. 608 (b)(4) 17

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Page

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Page

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Page

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INTEREST OF *AMICI CURIAE*[1]

The Legal Aid Society of the District of Columbia ("Legal Aid") was formed in 1932 to provide civil legal aid to individuals, families, and communities in the District who could not otherwise afford to hire a lawyer, as well as to encourage measures by which the law may better protect and serve their needs. Over the last three quarters of a century, Legal Aid has helped tens of thousands of District residents obtain meaningful access to justice. Legal Aid staff and volunteers provide a continuum of services from client education to full representation before a court or an administrative tribunal, with primary focus on cases involving child support and custody disputes, domestic violence, access to public benefits, consumer protection, and landlord-tenant disputes. In child support cases, Legal Aid provides representation to custodial and non-custodial parents alike when they cannot afford counsel. In appropriate cases, Legal Aid advocates in support of courts' use of their civil contempt authority—including the authority to incarcerate contemnors—as a means of ensuring compliance with the law. Legal Aid has concluded from its experience in child support cases that incarceration for civil contempt is both fairer and more effective at securing the desired result—

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondents Rebecca L. Rogers (formerly Rebecca Price) and Larry E. Price, Sr. have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk. Respondent South Carolina Department of Social Services maintains that it is not a party to these proceedings and does not have authority to give such consent.

payment of child support—when the alleged contemnor is represented by counsel.

Children's Law Center is the largest non-profit legal services organization in the District of Columbia and the only organization that provides comprehensive representation specifically on behalf of children. Children's Law Center envisions a future for the District of Columbia in which every child has a safe home, a meaningful education, and a healthy mind and body. The organization's 70-person staff, together with hundreds of pro bono partners, work toward this vision by providing free legal services to 1,200 children and families each year and by using the knowledge gained from representing these clients to advocate for changes in the law. In addition to providing a comprehensive range of free legal services to children and their families, Children's Law Center is committed to sharing its expertise with the community, other professionals, and policymakers through training and technical assistance. As an organization dedicated to improving the lives of children, Children's Law Center is particularly concerned with preserving and protecting both the resources available to children through child support and the due process rights of families.

DC Appleseed Center for Law and Justice ("DC Appleseed") is a nonprofit organization dedicated to solving pressing public policy problems facing the District of Columbia area. To advance this mission, DC Appleseed works with volunteer attorneys, business leaders, and community experts to identify those problems, conduct research and analysis, make specific recommendations for reform, and advocate effective solutions. DC Appleseed's projects include working with broad coalitions, issuing reports, participating in regulatory proceedings, bringing

lawsuits, managing public education campaigns, and meeting with and/or testifying before governmental decision-makers. One of DC Appleseed's projects concerns the District of Columbia's child support system. In August 2007, after two years of study, DC Appleseed issued a comprehensive report on the DC system, and since then DC Appleseed has been involved in implementing changes to the system that would make it more effective and equitable for all of its stakeholders.

The National Law Center on Homelessness & Poverty ("The Law Center") is a nonprofit organization based in Washington, D.C. It was founded in 1989 with the mission to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness. The Law Center strives to place homelessness in the larger context of poverty. By taking this approach, the organization aims to address homelessness as a very visible manifestation of deeper causes, including the shortage of affordable housing, insufficient income, and inadequate social services, including the lack of counsel for people experiencing poverty. The Law Center works with homeless people and their advocates to ensure that their constitutional and statutory rights are protected and supports efforts to ensure that legal counsel is made available to those who cannot afford representation. The Law Center also monitors and advocates against laws that "criminalize" homelessness by constructively punishing people for their status as poor or homeless. The Law Center has published numerous national reports on the criminalization of homelessness, brought litigation challenging laws that criminalize homelessness, and successfully worked with

communities around the country to implement constructive alternatives to criminalization.

INTRODUCTION AND SUMMARY

In *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), the Court wrote that its "precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and [it] thus dr[e]w from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. As the Court in *Lassiter* observed when discussing that rule in the context of a proceeding to terminate parental rights, the right to appointed counsel stems from "due process" generally, rather than the Sixth Amendment's right to the assistance of counsel in criminal cases. *Id.* at 25. *Lassiter* and the precedents it surveyed thus direct that when incarceration is at stake, the right to appointed counsel is not limited to only criminal cases, but applies equally in civil cases.

In line with this precedent, an indigent defendant facing incarceration as a contemnor has a due process right to appointed counsel regardless of whether the contempt proceeding is classified as civil or criminal. Because the consequence of losing such a case is the loss of unconditional physical liberty, it makes no practical difference—or any difference in the due process analysis—that the purpose of the confinement is to coerce compliance with a court order, rather than to deter or punish crime. Cf. *In re Gault*, 387 U.S. 1, 15-16, 35-36 (1967) (right to counsel applies to confinement of a juvenile offender even though purpose of confinement is meant to be "'clinical' rather than punitive"). Civil contemnors

are confined in the same jail facilities as persons convicted of crimes, obey the same rules, eat the same food, and experience the same separation from work, family, and society.

Contrary to the view of all of the federal circuits and the majority of the state courts of last resort that have considered the issue, the South Carolina Supreme Court held that no appointed counsel is required in civil contempt proceedings—even when incarceration is at stake—because the civil contemnor purportedly retains the ability to purge the sanction by compliance. Pet. App. 3a-5a. This rule is unsound both in theory and in practice. Because a defendant's inability to comply with the court order is a defense to civil contempt, the defendant's ability to purge the sanction often is itself the very issue that counsel is needed to help address.

As a practical matter, a significant number of low-income parents genuinely are unable to make the child support payments required of them, often for reasons that merit sympathy rather than scorn. Many such parents suffer from deficits in education and life skills that impede not only their ability to earn income and pay child support, but also their ability to explain to the court the reasons they are unable to make payments. Chronic physical ailments and low-level mental illness are also frequently factors that infect these proceedings. To be sure, some parents who fail to pay child support have no compelling excuse. Some may be entirely unsympathetic. But without counsel, there is a high risk of error; courts are less able to distinguish the poor from the recalcitrant, and injustice is done by incarcerating a debtor to coerce a payment that he is not able to make.

Amicus Legal Aid has experience representing both custodial and non-custodial parents in child support actions, and other *amici* have studied the issues confronting indigent persons before the courts. They have all found that most indigent persons accused of civil contempt need the assistance of a lawyer to present a defense, including a defense based upon an inability to pay—just as they need such counsel in criminal proceedings. Appointing counsel will generally make child support enforcement proceedings more efficient and improve the long-term prospects for compliance with child support orders.

Incarcerating people to coerce them to pay money they do not have is not only unjust, but also counterproductive. Improper civil incarceration imposes costs on parents and children that can ultimately hinder the enforcement of child support orders and be contrary to the interests of the child. An incarcerated parent normally cannot remain employed, look for work, enter many training programs, or maintain a relationship with his child. And a person's jailhouse residence will certainly taint, if not destroy, his relationship with prospective employers.

Based on the experience of *amici* with the child support system, the benefits of the appointment of counsel would not come at the expense of creating imbalance between custodial and non-custodial parents. At issue here is the right to appointed counsel in the limited context of civil contempt proceedings in which incarceration is threatened, not in child support proceedings more broadly. Moreover, the reality of civil contempt for the nonpayment of child support is that the government is deeply involved in the proceedings, in such roles as initiator, prosecutor, and even assignee of the right to child

support payments. Even when a private party pursues the action, the very nature of contempt—a means of vindicating the authority of the court and imposing deprivation of physical liberty—ensures that the court itself has a significant interest in ensuring that no imbalance arises.

Although the appointment of counsel requires resources, budgetary constraints should not limit this access to justice. The interest at stake—freedom from actual incarceration—is significant in itself, and the fact that many States already provide counsel in these circumstances is compelling evidence that the costs are manageable. Because the assistance of counsel should help individuals avoid inappropriate incarceration, guaranteeing counsel will save governments the costs of unnecessarily incarcerating such individuals. Indeed, in the course of representing these individuals, counsel can often provide significant ancillary guidance that will help to address underlying issues by suggesting modifications of the enforcement obligation, locating education and job training, finding referrals to address any physical or mental illnesses, providing information about possible disability or other support payments, ensuring that the obligor receives credit for any child's benefits that derive from his disability benefits, and otherwise counseling the individual in a way that the courts rarely have the ability or the time to do. All of these services will advance the interests of justice and the best interests of the child at issue, while avoiding the senseless expense of running what could otherwise be, in effect, a debtor's prison.

ARGUMENT

I. THERE IS A HIGH RISK OF ERROR WHEN INDIGENT PARENTS ARE HELD IN CIVIL CONTEMPT AND INCARCERATED FOR FAILURE TO PAY CHILD SUPPORT.

Lassiter made clear that "[t]he preeminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." 452 U.S. at 25. The South Carolina Supreme Court, however, held that this right does not apply when the loss of liberty is for civil contempt, on the theory that "[a] contemnor imprisoned for civil contempt . . . hold[s] the keys to his cell." Pet. App. 3a. But that is no reason for denying counsel; whether the defendant truly holds the keys—or will be unable to comply no matter how long he is incarcerated—often is the very issue that he needs counsel to help him argue. See Pet. Br. 7, 35-37 & n.21 (civil contempt sanction cannot be imposed where defendant lacks ability to comply with the order at issue).

Among those individuals facing civil contempt sanctions for nonpayment of child support, there is a significant risk that courts will make erroneous determinations regarding their ability to pay when counsel is not present. As explained below, far from being a theoretical concern, observational data and the experience of *amici* indicate that a sizable portion of the parents who fail to pay child support genuinely are unable to do so, and furthermore, that they are incapable of mounting an effective inability-to-pay defense to a contempt charge without the assistance of counsel.

A. Individuals Who Fail To Make Child Support Payments Often Lack The Resources And Skills Necessary To Make Required Payments.

The unfortunate economic reality is that many non-custodial parents are, in fact, indigent and unable to meet their existing child support obligations. The federal Office of Child Support Enforcement reported that 70% of the over $70 billion in child support arrears nationwide were owed by non-custodial parents who had either *no* quarterly earnings (42%) or annual earnings of less than $10,000 (28%); only 4% of arrears were owed by non-custodial parents who had annual earnings of over $40,000.[2] Similarly, an Urban Institute study in California found that 80% of arrears were owed by parents with less than $15,000 net income, over half of arrears were owed by debtors with less than $10,000 in net income but more than $20,000 in debt, and only 1% of child support debtors had net incomes over $50,000.[3] Many of these low-income debtors lack sufficient

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[2] *See* U.S. Dep't of Health & Human Servs., Admin. for Children and Families, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* ("HHS Report") 4, 5 (2004), *available at* http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28a.pdf.

[3] *See* Elaine Sorensen et al., The Urban Inst., *Examining Child Support Arrears in California: The Collectibility Study* ("California Collectibility Study") at Executive Summary-10-11, 3-5 (2003), *available at* http://www.childsup.ca.gov/Portals/0/resources/docs/reports/2003/collectibility2003-05.pdf. *See also* Vicki Turetsky, Ctr. for L. & Soc. Pol'y, *Staying in Jobs and Out of the Underground: Child Support Policies that Encourage Legitimate Work* 3 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0349.pdf (summarizing findings in California Collectibility Study).

funds to meet their child support obligations. The Urban Institute calculated that 64% of parents who owed child support debt in California were subject to orders that were too high relative to their ability to pay, whereas only 36% of parents who accrued arrears had the ability to pay but did not. See California Collectibility Study at 5-4.

Within a low-income population, non-custodial parents who fail to make child support payments are "more likely to be 'dead-broke' than deadbeat."[4] Such poverty renders significant portions of child support debt effectively uncollectible. For example, in the District of Columbia, where 70% of the child support caseload consists of current or former welfare recipients, recent collection efforts brought in *only four percent of arrears*. DC Appleseed Report at 47, 111.

The high rate of indigence among child support debtors is due in large part to the inability of many non-custodial parents to obtain and retain employment. In the District of Columbia, an "overwhelming majority of absent parents . . . are low-income, undereducated, and tenuously connected to the workforce." *Id.* at 17. Many are part of an unstructured labor market, sometimes in grey-market industries. Even before the current economic downturn, fewer than one in five non-custodial fathers were employed year round. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*,

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[4] *See* DC Appleseed Ctr. for Law and Justice, Crowell & Moring LLP, and Kilpatrick Stockton LLP, *Taking Care of the District's Children: The Need to Reform DC's Child Support System* ("DC Appleseed Report") 51 (2007), *available at* http://www.dcappleseed.org/library/DC%20Appleseed%20Report-Rev6-1.pdf.

18 Cornell J.L. & Pub. Pol'y 95, 106 (2008). Another study showed that low-income non-custodial fathers were, on average, employed for only about 30 weeks per year. Today, a sustained period of high unemployment rates has exacerbated the problem, particularly for less-skilled workers.[5]

Unemployment or marginal employment cannot be disregarded as simply voluntary. To the contrary, a parent might be unable to find and hold on to work because he lacks a formal education or marketable skills, suffers from an addiction or other mental health problems, or has a criminal record that makes employers reluctant to hire him.[6] See, *e.g.*, Patterson, *supra*, at 105-06. Furthermore, many of the governmental welfare benefits that might help an individual overcome such obstacles are available only to custodial parents. See *id.*

In many cases, however, the amount of the child support obligation does not accurately reflect the obligor's actual economic circumstances. First, a child support order can reflect economic realities only to the extent that the official determining the level of support has accurate and complete information about the non-custodial parent's financial circumstances. See, *e.g.*, D.C. Code § 16-916.01(d)(11) (2001) (gross

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[5] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=LNS14000000 (last visited Jan. 10, 2011).

[6] "Employers are much less likely to hire people with a criminal record than other groups of comparably skilled workers." Kirsten D. Levingston and Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 Clearinghouse Rev. J. Poverty L. & Pol'y 187, 191 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0394.pdf.

income to be based on evidentiary record). But parents of limited means, and particularly those with limited education and practical skills, often have difficulty understanding and participating in the proceedings at which the initial child support obligation is set. In the experience of *amici*, many such parents do not fully appreciate the obligations being imposed and often are so deferential that they fail to object even when payment levels seem too high. See DC Appleseed Report at 121-22. As a result, some child support orders are, at the outset, set higher than the non-custodial parent can afford to pay.

Moreover, when information is unavailable, support may instead be calculated based on an imputed income, as happened in this case. See, *e.g.*, Pet. Br. 8-9 & n.5 (explaining process by which Petitioner was found to be unemployed but nonetheless had imputed to him a gross monthly income of $1,386). Certain legal presumptions can also pose obstacles. In the District of Columbia, for example, the support calculation guidelines apply presumptively, and any departure from them must be justified in writing. D.C. Code § 16-916.01(p) (2001). And, when the calculating officer determines that a low-income individual is able to make some level of payment, the guidelines set a presumptive minimum. See *id.* § 16-916.01(g)(3).

These sorts of imputation procedures and presumptions tend to affect disproportionately those parents who are least skilled and most unable to make child support payments at a significant level. See Rebecca May & Marguerite Roulet, Ctr. for Fam. Pol'y & Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices* 39-40 (2005),

available at http://www.cfpp.org/publications/pdfs/noncompliance.pdf. These parents may be the least able to present detailed financial records, and thus are the most likely to have imputed incomes or, in some jurisdictions, default child support orders that overestimate their true earning capacity. These parents are also the least likely to be able to afford legal representation. See *id.* at 39.

Second, many of the same socioeconomic challenges that present barriers to employment also make it difficult for individuals to seek modifications to their child support orders when their financial circumstances change, or even to know that they can seek modification of an order when circumstances change. Without the aid of counsel, these individuals often do not understand the standards and procedures for modification, leaving them subject to enforcement of outdated payment standards. For example, an observational study in the District of Columbia found that "it is sometimes unclear if [non-custodial parents who agree to payment plans] are agreeing to appear compliant, because they do not know they have the right to object, because they do not understand, or because they fully agree that they should, and will, pay the required amount." DC Appleseed Report at 121. Even those parents who are able to present legitimate requests for downward modifications are at a disadvantage; some observers have found that the District of Columbia's Child Support Services Division "routinely challenges any request for downward modification no matter how reasonable" and "claims that it files oppositions to downward modification motions in order to preserve the government's right to a hearing and to ensure that the non-custodial parent provides appropriate evidence." *Id.* at 113 (citing Letter from Linda

Singer, DC Attorney General to Judy Berman, DC Appleseed Senior Program Associate (May 15, 2007)).

Third, even when a parent can afford to pay the current monthly obligation, an accumulation of past arrears can make full compliance impossible. Often, those arrears accumulate during times when the parent is not able to pay them. In this case, Petitioner's initial child support order was made retroactive to the date of the first negotiation conference, and his arrears continued to accumulate even while he was hospitalized and incarcerated. See Pet. Br. 8-10. Modifications may be available for hospitalized or incarcerated parents, but the arrears have already accumulated "[b]y the time most incarcerated parents become aware that they should have taken steps to request modification." Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 Geo. J. Poverty L. & Pol'y 313, 328-29 (2006). Child support obligations are rarely modified for incarcerated parents in the District of Columbia. See DC Appleseed Report at 95.

B. Indigent Parents Are Often Unable To Present A Cogent Defense In Civil Contempt Proceedings Without The Assistance Of Counsel.

Based on any combination of the circumstances outlined above, the facts in a given case may show that a child support debtor lacks the present ability to pay the required support.[7] But possessing helpful

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[7] Consistent with constitutional requirements, South Carolina does not hold an individual in contempt for failure to meet a child support obligation if the court determines that the

facts is not enough; the defendant must also identify, document, and marshal those facts to present a convincing argument. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), long ago observed the "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. For an indigent child support debtor, who may lack even the basic skills necessary to hold a job, let alone mount a legal defense, the obstacles may be insurmountable.

Civil contempt proceedings can be extremely complex and often require skills and expertise beyond the capacity of those too poor to retain counsel. "Even the simplest inability to pay argument requires articulating the defense, gathering and presenting documentary and other evidence, and responding to legally significant questions from the bench—tasks which are probably awesome and perhaps insuperable undertakings to the uninitiated layperson." Patterson, *supra*, at 117 (internal quotation marks omitted). As the DC Appleseed report found, "[g]iven the high levels of illiteracy in DC, particularly among the low-income population that the child support system needs to reach, complex materials combined with a lack of legal representation are a near guarantee for non-custodial parents to feel overwhelmed and uninformed." DC Appleseed Report at 72.

Without counsel, there is a high risk that the defendant will be imprisoned despite actually being unable to pay child support. See, *e.g.*, *Pasqua* v. *Council*, 892 A.2d 663, 673 (N.J. 2006) ("When an indigent litigant is forced to proceed at [a civil

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individual is unable to pay." *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983).

contempt] hearing without counsel, there is a high risk of an erroneous determination and wrongful incarceration."). The experience in North Carolina has been instructive. Although its courts are required in a civil contempt proceeding to make a specific determination regarding the defendant's ability to pay, before its highest court required appointment of counsel, it was "not altogether infrequent" for a trial court to "order the imprisonment of an unrepresented civil contemnor in a nonsupport case without determining whether he is able to pay the amount of child support owed." *McBride* v. *McBride*, 431 S.E.2d 14, 19 & n.4 (N.C. 1993) (citing cases). As the North Carolina Supreme Court correctly noted in recognizing a right to appointed counsel, "[a]n attorney would raise such issues on behalf of an indigent defendant, thereby preventing an unjustified deprivation of the defendant's physical liberty and increasing the accuracy of the proceeding." *Id.* at 19.

That a defendant must show his indigence in order to obtain appointed counsel in no way demonstrates that he is capable of making the separate showing that he is unable to pay his child support obligations without the assistance of counsel. Cf. Rogers Opp. 35-36. To the contrary, establishing indigence to qualify for appointed counsel is much more straightforward than establishing an inability-to-pay defense in a civil contempt proceeding. In the District of Columbia, for example, the relevant question for appointment of counsel in criminal cases and certain civil matters involving loss of liberty is simply whether a defendant "is financially unable to obtain counsel." D.C. Code § 11-2602 (2001); see also *id.* § 16-2304(a) (same standard for appointment in child abuse and neglect proceedings). Those

determinations are typically made not in a courtroom, but by administrative personnel reviewing form financial affidavits.[8] In contrast, a parent's inability to comply with a child support order is litigated in a courtroom, and "the trial court considers all the circumstances of the case, including whether the defendant's asserted inability to pay is due to involuntary financial straits or a voluntary decision to reduce his or her income." *Smith* v. *Smith*, 427 A.2d 928, 932 (D.C. 1981) (citing *Freeman* v. *Freeman*, 397 A.2d 554, 556 (D.C. 1979)).[9] In South Carolina, the contrast between the two showings is particularly stark. Whereas a criminal defendant is presumed to be entitled to court-appointed counsel if his net income is equal to or below federal poverty guidelines,[10] South Carolina Supreme Court Rule 608 (b)(4), the burden of showing inability to pay in child support cases falls squarely on the defendant. See *Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986) (once the moving party has established the existence of the order and the fact of noncompliance, the burden shifts to the defendant to establish his inability to comply with the order); accord *Hicks* v. *Feiock*, 485 U.S. 624, 645-46 (1988) (burdens of production and persuasion may rest on defendant in a civil contempt proceeding).

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[8] See D.C. Joint Comm. On Judicial Admin., *Plan for Furnishing Representation to Indigents under the District of Columbia Criminal Justice Act* § II(B) (effective Mar. 1, 2009), *available at* http://www.dccourts.gov/dccourts/docs/cja_plan.pdf.

[9] Other jurisdictions also require the obligor to make detailed financial showings or to demonstrate the involuntariness of the circumstances. *See* Pet. Br. 35-37 & nn. 20, 21.

[10] The 2010 poverty guideline for an individual in South Carolina is $10,830. 75 Fed. Reg. 45,628, 45,629 (Aug. 3, 2010).

Given the large percentage of civil contemnors in South Carolina who are indigent, there is a significant risk that South Carolina courts are not adequately assessing an individual's ability to pay in contempt proceedings, and improperly incarcerating these individuals in violation of South Carolina law.[11] Without providing counsel to civil contemnors to guard against this risk, there is a real danger that "assembly-line justice"—indeed, assembly-line injustice—is being meted out. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 34-36 (1972).

II. PROVIDING COUNSEL IN CIVIL CONTEMPT PROCEEDINGS ENHANCES THE FAIRNESS AND EFFICIENCY OF CHILD SUPPORT ENFORCEMENT.

A. Guaranteeing Counsel In Civil Contempt Proceedings Benefits All Participants In The Child Support System.

Providing counsel to individuals facing the threat of incarceration for civil contempt has system-wide benefits that inure not only to non-custodial parents, but also to custodial parents and the children whose welfare is central to the child support system. By helping alleged contemnors articulate relevant, focused arguments—such as present inability to pay a child support debt—counsel can help prevent a variety of harms that follow from the incarceration of individuals who genuinely lack the present ability to make child support payments.

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[11] *See* HHS Report at 6 (30% of all arrears in South Carolina held by debtors with income under $10,000, and 42% held by debtors with no wage record).

First, and most fundamentally, it is both pointless and unjust to incarcerate an individual for failure to pay a debt that the individual lacks the present ability to pay. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 757 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action."); *Bearden* v. *Georgia*, 461 U.S. 660, 669 & n.10 (1983) ("[B]asic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine."). An incorrect determination regarding an alleged contemnor's ability to pay child support can result in the incarceration of a person for his poverty and the use of scarce penal resources in a fruitless attempt to coerce a payment that cannot be made. Such an outcome—in effect, a modern-day debtor's prison—is in no one's interest.[12]

Second, incarcerating parents who are unable to pay their child support obligations actually *decreases* the likelihood that those parents will pay child support obligations in the future or contribute in other meaningful ways to their children's lives. Although incarceration can induce compliance with a court order when the party has the ability to comply, it also carries significant and long-term negative side effects for the child, the custodial parent, and the noncustodial parent. The risk of those side effects—which are felt by custodial parents and children as much as anyone—makes it all the more important for there to be procedural safeguards (like the assistance of counsel) to ensure the accuracy of the determinations that lead to incarceration.

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[12] *See generally* American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* http://www.aclu.org/files/assets/InForAPenny_web.pdf.

Incarceration creates obstacles for parents who are trying to make child support payments. Perhaps most obviously, a parent who is behind bars is not in a position to earn the wages that are necessary to pay child support. Moreover, for those parents who were earning income before the finding of contempt, imprisonment can lead to the loss of the job that parent held, making it that much more difficult for the parent to resume work upon release. See, *e.g.*, *Argersinger*, 407 U.S. at 37 n.6 (noting that even short periods of incarceration "will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family") (internal quotation marks omitted).[13]

Social science research indicates that incarceration has a significant negative impact on a parent's *future* employability and wage level. Numerous studies have shown that, even after controlling for variables such as age, race, residence, education level, drug use, and other behavioral traits, individuals who have been incarcerated are still more likely to face difficulty in finding work, as well as lower wages once they do.[14] The effect is cumulative: Incarceration

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[13] *See also* Rebecca May, Ctr. for Fam. Pol'y and Practice, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents: When You Need a Safety Net, but There's Only a Dragnet* (2004), http://www.cffpp.org/publications/effect_child.html (last visited Jan. 10, 2011) ("Some of the participants in our focus groups and interviews lost employment that was only recently obtained because they were put in jail for nonpayment of child support"); Patterson, *supra*, 126-27.

[14] *See, e.g.*, The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* ("Pew Study") 11-12 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf; Amanda Geller, Irwin Garfinkel & Bruce

diminishes a person's earnings through age 48 by approximately half, and it significantly decreases upward economic mobility. Pew Study at 12, 16-17.

Research also shows that incarceration, taken alone, has adverse employment consequences separate and apart from those attributable to the difficulties associated with having a criminal history. *Id.* at 10. For example, individuals who have been incarcerated experience significantly greater negative employment effects than do individuals who received sentences of probation, indicating that incarceration, separate from the fact of criminal conviction, reduces a person's employability.[15] This is unsurprising because incarceration withdraws an individual from society, interrupts efforts to gain work experience, defines the person for himself and society as a "prisoner," exposes him or her to a peer group that is highly criminally active, and often leads to a build-up of child support arrearages that further diminishes incentives to work. See Pew Study at 10.

Incarceration also has detrimental effects on families and, in particular, children. Incarcerating a parent often impairs the parent-child relationship,[16]

Western, *The Effects of Incarceration on Employment and Wages: An Analysis of the Fragile Families Survey* 8-15, 22-25 (Princeton Univ. Ctr. for Research on Child Wellbeing, Working Paper #2006-01-FF, rev. Aug. 2006), *available at* http://crcw.princeton.edu/workingpapers/WP06-01-FF.pdf.

[15] See Richard Freeman, *Crime and the Employment of Disadvantaged Youth*, 11, 30 (Nat'l Bureau of Econ. Research, Working Paper #3875, 1991), *available at* http://www.nber.org/papers/w3875.pdf.

[16] *See, e.g.*, Jeremy Travis, Elizabeth Cincotta McBride & Amy L. Solomon, Urban Inst. Justice Pol'y Ctr., *Families Left Behind: The Hidden Costs of Incarceration and Reentry* 2-4 (rev. 2005),

an adverse consequence that is particularly damaging in the context of child support enforcement because research indicates that fathers who are uninvolved in their children's lives are less likely to pay child support.[17] In addition, "[r]esearch that controls for other variables suggests that paternal incarceration, in itself, is associated with more aggressive behavior among boys and an increased likelihood of being expelled or suspended from school." Pew Study at 21 (citing studies). One study found that children whose fathers have spent time in jail are nearly six times more likely to be expelled or suspended from school than children whose fathers have not. *Id.*[18] The effects of an inaccurate decision can thus echo down through the generations.

For these reasons, incarcerating civil contemnors can work at cross-purposes with the goals of child support enforcement. Indeed, it has been the experience of *amici* that many custodial parents often oppose coercive incarceration because they understand that it may actually reduce the support and parental attention that their children receive. The same principle has also led some governmental agencies to use arrears forgiveness as a tool to

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available at http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf (summarizing social science research).

[17] *See* Joy Moses, Jacquelyn Boggess & Jill Groblewski, Ctr. for Fam. Pol'y and Practice, *"Sisters Are Doin' It for Themselves," But Could Use Some Help: Fatherhood Policy and the Well-Being of Low-Income Mothers and Children* 18 (2010), *available at* http://www.cffpp.org/publications/pdfs/fatherhood_report.pdf (citing studies).

[18] These effects may be felt not only by the families to whom support payments are owed, but also other family members, including children from other marriages who may be in the custody of the parent owing child support arrears. *See, e.g.*, May, *supra*.

encourage prospective compliance. DC Appleseed Report at 112 (citing Sherri Heller, Address at National Child Support Association Mid-Year Policy Forum, Washington D.C. (Jan. 2004)). For example, the District of Columbia has instituted the Fresh Start debt forgiveness program, which allows for a portion of government-owed arrears to be forgiven for eligible non-custodial parents who are successfully paying their obligations.[19] Quite simply, for those individuals who lack the present ability to pay child support, incarceration offers no coercive benefit while imposing considerable risks.

Third, appointing counsel in civil contempt proceedings alleviates the burden on courts to handle tasks that defense counsel otherwise would be expected to perform. In a *pro se* contempt proceeding, the risk is significant that the defendant "lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). See also *supra* 14-18 (describing common obstacles to presenting a strong defense in civil contempt proceedings). When confronted with an alleged contemnor who is both unskilled and unrepresented, a court considering incarceration must either assume the burden of guiding the defendant through the process—which might involve exploring possible defenses and reviewing undigested financial documents presented in the first instance—or else risk ordering the defendant's incarceration without legal justification. Counsel are well equipped to focus the arguments on the relevant issues.

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[19] *See* Office of the D.C. Att'y General, Brochure, Fresh Start (Debt Forgiveness Program), *available at* http://csed.dc.gov/csed/frames.asp?doc=/csed/lib/csed/pdf/brochures/fresh_start.pdf.

Fourth, in addition to helping defendants present arguments that they are unable to pay, counsel also can help negotiate alternatives to incarceration that may ultimately provide more workable solutions for everyone involved. For example, South Carolina's child support laws provide that a court may, as an alternative to incarcerating a parent for civil contempt, direct the parent "to participate in an employment training program or public service employment," S.C. Code Ann. § 63-17-490 (2009), or place the parent "on probation under such conditions as the court may determine," *id.* § 63-17-500. Likewise, it may be more helpful to require addiction or other mental health treatment rather than relying upon the prison system to address issues for which it is often poorly equipped. An unrepresented defendant may not know to seek such alternatives, or how to do so effectively. In many circumstances, however, such alternatives may offer a better chance at inducing future child support payments than incarceration. Appointed counsel can play an important role in providing the court the arguments and evidence necessary to make a fair assessment of the alternatives.

Finally, even in cases where the defendant has engaged in willful contempt, the appointment of counsel can have salutary effects in light of the advisory role of legal counsel. The role of a lawyer is not limited to presenting arguments in court, but also can involve providing candid advice, including practical advice about a parent's legal and ethical obligations to support his child. Accordingly, a lawyer rendering advice "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." ABA Model Rule of Prof'l

Conduct 2.1.[20] Indeed, because "[p]urely technical legal advice . . . can sometimes be inadequate," it is "proper for a lawyer to refer to relevant moral and ethical considerations," such as "effects on other people." *Id.* cmt. 2. And, if a lawyer determines that the client would benefit from seeking the help of a professional in another field, such as social work or mental health, "the lawyer should make such a recommendation." *Id.* cmt. 3. In some instances, advice of this nature may be the most effective form of intervention that counsel can provide.

B. Providing Counsel To Alleged Civil Contemnors Will Not Prejudice Unrepresented Custodial Parents.

Importantly, the benefits of guaranteeing counsel for alleged contemnors do not come at the expense of fairness for custodial parents. Many custodial parents are themselves unrepresented by counsel, and it would be troubling indeed if providing counsel to noncustodial parents were to create unfair advantages in proceedings against custodial parents appearing *pro se*. Fortunately, the concern is not warranted, both because the contempt proceedings at issue are not, in fact, mere private disputes, and because non-custodial parents face structural disadvantages that custodial parents—even those appearing *pro se*—do not.

To be clear, the issue in this case is not whether a non-custodial parent has a right to appointed counsel in any and all child support proceedings. Rather, the

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[20] South Carolina, like the District of Columbia, has adopted ABA Model Rule 2.1 and its comments in full. *See* S.C. R. of Prof'l Conduct 2.1 and comments; D.C. R. of Prof'l Conduct 2.1 and comments.

question here is about a far narrower right: whether a non-custodial parent has a right to appointed counsel *in civil contempt proceedings in which the noncustodial parent risks incarceration*. The difference is significant both because incarceration is a power exercisable only by the government, and because the contempt process itself is the mechanism by which a State exercises its significant interest in "vindicat[ing] the regular operation of its judicial system." *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977). Quite simply, when a court must decide whether the government should incarcerate a party as a sanction for contempt of court, the proceeding has ceased to be merely a private dispute.

Concerns regarding imbalance are also unfounded because the government typically occupies a position adverse to the non-custodial parent throughout the contempt proceedings. In the District of Columbia, it is the Child Support Services Division ("CSSD") that is responsible for identifying cases of non-payment and filing motions for contempt. DC Appleseed Report at 56 (citing DC Code Ann. § 46-225.02). Similarly, it was South Carolina that initiated contempt proceedings in this case, through a series of automated judicial procedures.[21] See Pet. Br. 6-7, 10-11. In addition, the federal Temporary Assistance for Needy Families ("TANF") program requires States to assign themselves all child support benefits as a condition of receiving federal welfare dollars, see

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[21] South Carolina's family court rules require the court clerk to review a child-support obligor's payments on a monthly basis and, if the account is in arrears, to issue, *sua sponte*, a rule to show cause why the obligor should not be held in contempt, as well as an affidavit establishing the arrearage, which can be used as proof in a contempt proceeding. *See* S.C. Fam. Ct. R. 24; Pet. Br. 6.

42 U.S.C. § 608(a)(3) (2009), thus ensuring that local governments maintain an interest in child support collections. See D.C. Code § 46-203(a) (2001) (subrogating to the District the right "to prosecute or maintain any support action," as well as the right "to receive past, present, and future payments under an order or decree"); S.C. Code Ann. § 43-5-65(a)(1) (2009).

The mandatory assignment of child support rights also provides a mechanism by which the government obtains reimbursement for welfare benefits that it has paid to the custodial parent. Typically, only a portion of the payments collected will be directed to the custodial parent; the government will retain the remaining portion as reimbursement. See, *e.g.*, *id.* § 43-5-222. In some jurisdictions, the government will retain *the entire support payment* when necessary to cover the reimbursable amount.[22] The upshot of these reimbursement policies is that, as of 2003, approximately half of all child support arrears nationwide were owed to governments, not custodial parents; in some States, the amount owed to the government was as high as 75% of all arrears. See HHS Report at 5-6. Accordingly, the government has a strong interest in enforcing child support orders,

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[22] See Michelle Vinson and Vicki Turetsky, Ctr. for L. & Soc. Poly., *State Child Support Pass-Through Policies* (2009), *available at* http://s242739747.onlinehome.us/publications/passthroughfinal061209.pdf (listing policies by state). Although many States and the District of Columbia now guarantee that some amount of the payments received will be directed to the custodial parent, a significant number do not. Many States also reduce the benefits paid to a custodial parent when child support payments are made, which limits or eliminates the economic benefit that a custodial parent receives from child support payments. *See id.*

even when the custodial parent and the child will see little of the amount collected.

In the District of Columbia, the government's commitment to assisting custodial parents is significant enough that the court "has been observed referring to custodial parents as the 'client' of the 'government'" and making extra effort to ensure that "non-custodial parents know all the options, possibilities, and consequences of the actions being taken since they 'don't have an attorney.'" DC Appleseed Report at 122-23 & n.393 (citing government-provided materials and 2007 interview with District of Columbia court personnel). Although the District of Columbia Office of the Attorney General ("OAG") currently represents only the District in child support cases, until October 2000, OAG directly represented custodial parents in child support cases, which made the custodial parent quite literally the "client" of the government.[23] In practice, this change in representation has had "little practical effect, especially because the interests of the custodial parent often align closely with CSSD, *i.e.*, requiring the non-custodial parent to pay child support." *Id.*

III. RESOURCE CONSTRAINTS DO NOT JUSTIFY DENYING THE RIGHT TO COUNSEL.

Providing counsel requires resources, and some may question whether resources are too scarce to guarantee counsel to individuals before incarcerating them for civil contempt. Although it is difficult to predict the precise budgetary impact of recognizing

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[23] *See id.* at 57 (citing Memorandum from Talia Sasson Cohen, Policy Counsel, OCC/CSED Policy Counsel Memo to All Child Support Staff, Revised New Representation Policy (Jan. 4, 2001)).

this right, this is not a case in which procedural protections must fall victim to budgetary concerns.

As an initial matter, the cost of appointing counsel enters the equation only as part of a due process balancing analysis that weighs the government's pecuniary interests against, *inter alia*, the defendant's liberty interest and the likelihood that the procedures followed in the contempt proceeding will yield an accurate decision.[24] *See Lassiter*, 452 U.S. at 27-28; *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Under this balancing test, the budgetary and administrative burdens on the government would have to be extraordinary to justify withholding counsel in cases of actual incarceration, when the need for that procedural protection is at its peak. *See, e.g.*, *Lassiter*, 452 U.S. at 26; cf. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1079-80 (1976) ("If the obligation [of ensuring access to counsel] is one of justice, it is an obligation of society as a whole.").

Every indication, however, is that the costs at issue are far from prohibitive. Perhaps the best evidence that governments can afford to ensure access to counsel in cases like this is that many States already do so. Cf. *Alabama* v. *Shelton*, 535 U.S. 654, 670 (2002) (explaining that concern regarding the practical impact of providing counsel in cases of suspended sentences was unjustified in light of many States' existing practice of doing so). As Petitioner has noted, the courts of last resort in fifteen States have recognized the right at issue here, as have the

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[24] The government also has an interest in the welfare of supported children which, as explained *supra*, is advanced by the appointment of counsel.

intermediate appellate courts in eight additional States. See Pet. 16-17 & n.9 (citing cases).

For example, in *Mead* v. *Batchlor*, 460 N.W.2d 493 (Mich. 1990), the Michigan Supreme Court ruled that any budgetary considerations were outweighed in the *Eldridge* balancing analysis by the other interests at stake. *Id.* at 503-05 & n.29. In reaching this conclusion, the court solicited input from both the State Attorney General—who took the position that "counsel should be appointed for indigents facing incarceration for child nonsupport regardless of cost," *id.* at 504 n.29—and the Association for Michigan Counties—which argued only that there would be significant costs involved in "providing counsel in *all* child support proceedings," as opposed to the subset of proceedings in which incarceration is at stake, *id.* at 504-05.

Similarly, New Jersey recognizes a right to appointed counsel in a wide variety of situations that include, but go far beyond, civil contempt proceedings involving possible incarceration, thus putting to rest the notion that recognizing the right at issue here is prohibitively expensive. See *Pasqua*, 892 A.2d at 675-76.[23]

Any consideration of resources would be incomplete if it did not also account for the resources that governments *save* by providing counsel to indigent defendants. The appointment of counsel will help to reduce instances of improper incarceration and thereby reduce the government's incarceration costs.

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[23] New Jersey provides counsel not only to civil contemnors facing incarceration, but also to individuals facing the loss of motor vehicle privileges in drunk driving cases, heavy fines in municipal court proceedings, the termination of parental rights, and sex offender classification. See *id.*

See, *e.g.*, *Mead*, 460 N.W.2d at 505 ("Considering also that the appointment of attorneys in some cases will save the government jail housing costs, the record and briefs made available in this case leave one to speculate whether a cost increase or a cost saving will be the ultimate result."). These cost savings can be significant. For example, the State of South Carolina spent $14,545 per inmate on incarceration costs in 2009 alone. See S.C. Dep't of Corrections, *Cost Per Inmate, Fiscal Years 1988-2009* (Nov. 19, 2009), http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2009.pdf (last visited Jan. 11, 2011). By way of comparison, South Carolina currently compensates court-appointed counsel at a rate of $40 an hour for time spent out of court and $60 an hour for time spent in court, with total compensation capped at $1,000 per case for misdemeanors and $3,500 per case for felonies. See S.C. Code Ann. § 17-3-50(A) (2009).

Even if it is difficult to predict the precise costs and savings associated with providing counsel in these cases, comfort can be found in the fact that concerns expressed in the past about the administrative costs of far broader expansions of the right to counsel proved to be unwarranted. When, for example, this Court held in *Gideon* that appointed counsel was constitutionally required in a state felony case, it rejected arguments that "this requirement would impose an enormous burden on members of the Bar who might be called upon to defend such charges" and "[t]he entire undertaking would result in unnecessary expense to tax payers." Resp. Br. at 47, *Gideon*, 372 U.S. 335 (filed Jan. 2, 1963) (No. 155). Likewise, when this Court extended the right to include misdemeanor proceedings resulting in incarceration, some Justices worried that "[t]he

holding of the Court today may well add large new burdens on a profession already overtaxed," *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring), or that the holding would present "a practical impossibility for many small town courts" such that "[t]he community could simply not enforce its own laws," *id.* at 61 (Powell, J., concurring). Experience, however, has demonstrated that even "the requirements of *Argersinger* have not proved to be unduly burdensome." *Scott* v. *Illinois*, 440 U.S. 367, 374 n. 5 (1979).

Moreover, the same scarcity of resources that animates concerns regarding the administrative costs of appointing counsel also serves to highlight the need for doing so. Although the country's current economic conditions may have taken their toll on governmental budgets, they have also led to the most prolonged period of high unemployment in over twenty-five years. See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey. High long-term unemployment rates are likely both to increase the number of parents who legitimately cannot pay child support, cf. *supra* 10-11, and to increase the difficulty that recently-incarcerated parents face in looking for work, cf. *supra* 11 & n.6.

Similarly, any concern regarding the volume of contempt proceedings that might be affected by a ruling in this case is more than offset by the risk that the same volume "may create an obsession for speedy dispositions, regardless of the fairness of the result." *Argersinger*, 407 U.S. at 34. In the context of misdemeanor trials, this Court has recognized that the appointment of counsel can help prevent the devolution of efficiency into "assembly-line justice." *Id.* at 36 (internal quotation marks omitted).

These same protections are needed for individuals facing incarceration for civil contempt; the hearing at issue in this case illustrates the point perfectly. After providing each parent with a short opportunity to speak, the court provided no substantive response to anything said, made no statement or inquiry regarding Petitioner's ability to pay child support, and proceeded to impose twelve months of incarceration without providing any statement of reasons. Pet. App. 17a-18a. When Petitioner asked why work credits and good time credits were not available to him, the court responded simply, "Because that's my ruling." Pet. App. 18a. Had counsel been present, Petitioner would have been better able to present the court with arguments that it was too hurried to consider on its own.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

14

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MICHAEL D. TURNER, *Petitioner*,
v.
REBECCA L. ROGERS, ET AL., *Respondents*.

On Writ of *Certiorari* to the Supreme Court of South Carolina

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRENNAN CENTER FOR JUSTICE, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, THE SOUTHERN CENTER FOR HUMAN RIGHTS, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PROVIDING COUNSEL TO AN INDIGENT INDIVIDUAL IN A CIVIL CONTEMPT HEARING IS ESSENTIAL TO PREVENT WRONGFUL INCARCERATION 5

A. Indigent Parents Facing Contempt Proceedings Encounter Significant Obstacles That Especially Necessitate the Assistance of Counsel 6

1. Alleged contemnors are frequently indigent 6

2. Indigent parents facing contempt charges often lack the basic skills necessary to defend themselves in court 8

B. Representation by Counsel is Necessary to Ensure that a Contempt Proceeding Does Not Result in Wrongful Incarceration 10

1. The defense of a contempt charge for nonpayment of child support is complex 11

2. Significant evidence suggests that alleged contemnors frequently have meritorious inability-to-pay defenses 14

3. The experience of indigent parents in Georgia demonstrates the harm caused by the failure to provide court-appointed counsel.....16

4. Wrongfully incarcerating non-custodial parents who simply cannot pay does not serve the goals of contempt and visits serious, harmful consequences on the contemnor, his or her family, and the state.....20

5. Evidence demonstrates that the presence of counsel helps to ensure that only those persons who willfully refuse to pay child support will be incarcerated.....22

II. A CLEAR RULING THAT COUNSEL IS REQUIRED FOR ALL INDIGENT ALLEGED CONTEMNORS FACING INCARCERATION IS NECESSARY TO PREVENT WRONGFUL INCARCERATIONS AND ENSURE DUE PROCESS.....26

III. PROVIDING COUNSEL TO INDIGENT ALLEGED CONTEMNORS FACING INCARCERATION WILL NOT IMPOSE A SIGNIFICANT BURDEN ON THE STATES.....30

CONCLUSION.....32

TABLE OF AUTHORITIES

Page(s)

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Gideon v. Wainwright, 372 U.S. 335 (1963) 2, 5

In re Warner,
905 A.2d 233 (D.C. 2006) 12

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304 U.S. 458 (1938) 5, 6

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431 S.E.2d 14 (1993) 22

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646 P.2d 1240 (N.M. 1982) 13

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892 A.2d 663 (N.J. 2006) 20, 21

Peterson v. Roden,
949 So. 2d 948 (Ala. Civ. App. 2006) 20

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287 U.S. 45 (1932) 3, 6

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742 F.2d 262 (6th Cir. 1984) 21

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427 A.2d 928 (D.C. 1981) 12

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STATUTES

Fla. Stat. § 938.30(9) 27

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Telephone Interview with Sarah Rackley, Assistant Public Defender, Durham County, North Carolina, July 23, 2010.. 23, 24, 25

Telephone Interview with Wendy Sotolongo, Parent Representation Coordinator, North Carolina Office of Indigent Defense Services, July 15, 2010 ..... 23, 25

U.S. Dep't of Educ., *Literacy Behind Bars* (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf 8

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 11,000 members nationwide – joined by ninety state, local, and international affiliate organizations with another 30,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America's criminal justice system.

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work are its efforts to close the "justice gap" by

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties were notified prior to the filing of this brief of our intention to file, and consent to file was obtained from all parties except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Brennan Center's Access to Justice Project works to ensure that low-income individuals, families, and communities in this country are able to obtain effective legal representation.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation that seeks to secure equal justice by supporting excellence in the delivery of public defense and civil legal aid services to those who cannot afford counsel. NLADA has approximately 700 program members, including nonprofit organizations, government agencies, and law firms, representing 12,000 lawyers. Created in 1911, NLADA is a recognized expert in public defense services and a leader in the development of national public defense standards.

The Southern Center for Human Rights ("SCHR") is a non-profit, public interest law office that is dedicated to enforcing the civil and human rights of people in prisons, jails, and other criminal justice institutions in Georgia and Alabama. SCHR aims to ensure that the quality of justice received by individuals is not dependent on one's income, and that defendants with financial means and those without are treated equally in the courts. In recent years, SCHR has represented numerous indigent parents who were jailed for long periods, without counsel, for being too poor to satisfy their child support obligations.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization

with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that mission, the ACLU has been involved in numerous cases before this Court involving the right to counsel when individual liberty is at stake, beginning with *Powell v. Alabama*, 287 U.S. 45 (1932). In addition, the ACLU recently published a report documenting the increasing incarceration of indigent individuals unable to pay judicially ordered legal debts. American Civil Liberties Union, In For a Penny: The Rise of America's New Debtors' Prisons (2010).

Although NACDL, the Brennan Center, NLADA, SCHR, and ACLU (collectively the "*amici curiae*") all have different missions, all have a significant interest in guaranteeing – and urge this Court to ensure – that all indigent individuals have a right to counsel in civil contempt hearings when they face imprisonment.

SUMMARY OF ARGUMENT

Civil contemnors are entitled to counsel when facing the threat of incarceration. Indigent parents who face imprisonment for nonpayment of child support often lack the basic skills necessary to defend themselves against contempt charges. Such individuals often face unique obstacles that make it difficult for them to represent themselves in court, such as under-education and lack of literacy skills.

Accordingly, for indigent parents facing civil contempt charges, representation by counsel is especially necessary for the contempt hearing to be fair and effective. In the child support context, the

burden is placed on the parent to show that he or she is unable to meet the child support obligation; however, the inability-to-pay defense is a complex one to present. The assistance of counsel is essential to establish that an indigent parent's nonpayment was in fact not willful. Without ensuring that an alleged contemnor actually has the ability to pay, the courts risk wrongful imprisonment and the creation of debtors' prisons.

Significant evidence suggests that parents facing contempt charges frequently have meritorious inability-to-pay defenses. In the absence of counsel, this defense often goes ignored. The imprisonment of these indigent parents does not result in deterrence of future nonpayment, but does pose serious and harmful consequences to the parent, the family, and the state.

The contrasting experiences of indigent parents who have counsel and those who do not demonstrate the necessity of counsel. For instance, in North Carolina, where counsel is provided to indigent parents facing incarceration, counsel is helpful to both the court and the parent, and ensures that only those who willfully have not paid support are incarcerated for coercive purposes. By contrast, in Georgia, where indigent parents face civil contempt charges without the assistance of counsel, long jail sentences are meted out even in cases where it should have been clear that willfulness was lacking.

This Court should confirm the established constitutional rule that the appointment of counsel is required whenever a defendant's liberty is at

stake, regardless of whether the hearing is technically categorized as "civil." While the majority of states provide counsel and thus would not be affected by such a decision, a clear ruling from this Court would bring uniformity to the enforcement of the right to counsel across the country and ensure that all individuals facing incarceration for contempt receive a fair hearing.

Amici curiae urge this Court to reinforce the constitutional rule that no indigent person should face the threat of imprisonment without being provided the assistance of counsel.

ARGUMENT

I. PROVIDING COUNSEL TO AN INDIGENT INDIVIDUAL IN A CIVIL CONTEMPT HEARING IS ESSENTIAL TO PREVENT WRONGFUL INCARCERATION.

No indigent person should be unrepresented when his or her freedom is at stake. In the criminal context, this Court has recognized that indigent defendants facing the potential loss of liberty need lawyers because of "the obvious truth that the average defendant does not have the professional legal skills to protect himself." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Thus, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The contempt context is no different. In this case, this Court should reassert what its precedents already acknowledge: our legal system's commitment to fairness and equal justice requires that indigent individuals have a right to

appointed counsel at any hearing at which they face loss of their liberty.

A. Indigent Parents Facing Contempt Proceedings Encounter Significant Obstacles That Especially Necessitate the Assistance of Counsel.

Most individuals do not have the skills to represent themselves successfully in a court of law. As this Court recognized long ago, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Johnson*, 304 U.S. at 462-63 (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself .... That which is simple, orderly and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious."). Indigent parents, who are often under-educated, are at an even greater disadvantage when it comes to understanding the legal system and defending themselves.

1. Alleged contemnors are frequently indigent.

Indigent non-custodial parents face significant challenges to meeting payment obligations. According to the federal Office of Child Support Enforcement, 70% of child support debt is owed by non-custodial parents with no quarterly income or with annual earnings of less than $10,000. *See* Office of Child Support Enforcement, Dep't of Health

and Human Servs., *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 4 (July 2004). *See also* Rebecca May & Marguerite Roulet, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices*, Center for Family Policy & Practice 9 (Jan. 2005) ("May & Roulet") (analyzing data on child support debtors). Only 4% of child support arrears are owed by non-custodial parents with annual incomes of more than $40,000. *Id.*

Indigent non-custodial parents, unfortunately, tend to remain indigent and therefore unable to meet their child support obligations. A primary reason for the continuing state of indigence is lack of employment opportunities. According to one study, low-income non-custodial fathers earned an average of only $4,221 annually. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J. L. & Pub. Pol'y 95, 106 (2008) ("Patterson").

Another study found that in 1999, 92% of non-indigent fathers were working, compared to only about half of indigent fathers who had work at the time of the survey. Elaine Sorensen & Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, The Urban Institute 6 (Apr. 2002) *available at* http://www.urban.org/UploadedPDF/410477.pdf ("Sorensen & Oliver"). This study also found that in addition to low levels of education, incarceration, lack of recent work experience, and poor health conditions were also significant obstacles to employment. *Id.* at 6-7.

Over half of indigent non-resident fathers lacked health insurance. *Id.* at 9. Among the indigent non-custodial fathers who were not employed, half indicated that poor health was the reason for not working. *Id.* at 6-7.

Finding and maintaining employment in the current economy is especially challenging, and the last hired are often the first fired. Without meaningful employment, indigent non-custodial parents frequently lack the basic means to meet their support obligations.

2. Indigent parents facing contempt charges often lack the basic skills necessary to defend themselves in court.

Indigent parents accused of contempt are often under-educated and lack the necessary skills to represent themselves in court. Extensive research confirms that indigent defendants in general tend to be among the least educated and least literate members of society. *See generally*, U.S. Dep't of Educ., *Literacy Behind Bars* 45 (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf ("Literacy Report").[2] For example, 63% of the state prison inmates whose personal income in the month before

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[2] The Literacy Report summarizes results from the 2003 National Assessment of Adult Literacy Survey. Literacy Report, *supra*, at iii. The survey examined three types of literacy: prose literacy, document literacy, and quantitative literacy. *Id.* at iv. For each literacy type, the survey grouped respondents into four literacy levels, including below basic, basic, intermediate, and proficient. *Id.*

arrest was less than $1000 had failed to graduate from high school. *See* Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, *Education and Correctional Populations* 10 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf.[3]

Indigent parents with child support obligations are, much like indigent criminal defendants, disadvantaged relative to the general population. A 2002 study of fathers with child support obligations found that 41% of indigent fathers did not have a high school diploma – double the rate for those whose income was not below the poverty threshold. Furthermore, non-indigent fathers were three times more likely than indigent fathers to have attended school beyond twelfth grade. Sorensen & Oliver, *supra*, at 7; *see also* Patterson, *supra*, at 106.

Burdened with under-education and illiteracy, indigent parents suffer from a lack of practical skills and abilities. For such an individual, understanding what a judge is asking and articulating his or her case persuasively is a difficult task.

Those *amici* and their members who have provided representation in contempt proceedings have found that even questions that might seem straightforward to educated persons, or attorneys, may create complexities for indigent individuals. For instance, an indigent parent asked if he or she "has a home" may well be unsure about whether the

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[3] By contrast, only 18% of the general population has failed to complete high school. Sorensen & Oliver, *supra*, at 1.

question seeks information about owning a home, or only about whether he or she maintains a residence of any sort. The individual may be concerned, as well, about answering fully, if, for example, he or she is not listed on a lease or the landlord does not know that he or she shares the space with others. Similarly, indigent defendants living in subsidized housing, homeless shelters, or halfway houses may be concerned about the impact a reported arrest could have on their living situation. While wanting to cooperate in a hearing, concern over such matters can lead an indigent parent to hesitate or appear confused. A disinclination to speak may also arise from an inability to comprehend the nature of the questions. This hesitation or failure to respond is then often interpreted as a failure to cooperate, which, particularly in the context of a contempt proceeding, can be determinative.

In this way, requiring indigent parents to proceed alone poses a serious threat to their right to be heard. Without legal counsel, indigent parents facing the threat of imprisonment too often lack the ability to effectively represent themselves.

B. Representation by Counsel is Necessary to Ensure that a Contempt Proceeding Does Not Result in Wrongful Incarceration.

A parent who is haled into court for failure to meet child support obligations and faces incarceration as a result is precisely the type of person for whom court-appointed counsel is necessary.

A normal contempt proceeding for failure to pay consists of many intricate steps, all of which

present challenges for the layman. Parents facing the charge of contempt must anticipate and present their own defense. They must spot and prioritize issues, develop facts and arguments, conform to the rules of evidence, obtain documents and testimony, and challenge the evidence presented by their opponents. Often, the parent bears a significant evidentiary burden. Such circumstances are difficult even for trained attorneys to handle, and especially difficult for individuals with significant educational barriers.

1. The defense of a contempt charge for nonpayment of child support is complex.

To find a non-custodial parent in contempt of the court order setting forth child support obligations, the court must determine that the failure to pay is willful. *See, e.g.*, S.C. Code Ann. § 63-3-620 (2009) ("An adult who willfully violates, neglects, or refuses to obey or perform a lawful order of the court ... may be proceeded against for contempt of court."); *see also* Patterson, *supra*, at 104-105. For a contempt finding to be appropriately applied, the alleged contemnor must have known about the court order and willfully disobeyed it. These safeguards are in place to prevent the incarceration of those who are incapable of complying with the court order.

Willfulness, or intentionality, is a critical criterion for a finding of contempt. Without the component of willfulness, contempt charges would fall on all those who failed to meet their child support obligations, whether or not they were in fact

able to make those payments. *See, e.g., In re Warner*, 905 A.2d 233, 243 (D.C. 2006) (Schwelb, J., concurring) (warning that unrestrained use of the contempt power in child support cases "present[s] a significant risk that a non-custodial parent will face imprisonment on account of poverty"). Only by ensuring that the failure to pay leading to contempt and imprisonment is something the parent could have prevented can we avoid the effective return to debtors' prisons.

The burden is on the parent to prove that his or her noncompliance was not willful. The basic rule, as set forth in state contempt statutes and elucidated by this Court in *United States v. Rylander* is that, after the state demonstrates noncompliance with a payment order, the contemnor may assert an inability to comply with the order in question as a defense, but the contemnor bears the burden of production. 460 U.S. 752, 757 (1983). Providing sufficient evidence to meet this burden can be very difficult for an indigent alleged contemnor trying to represent himself or herself.

Key to this analysis in some jurisdictions is the question of whether the defendant's inability to pay is caused by some voluntary action on the part of the defendant. *See, e.g., Smith v. Smith*, 427 A.2d 928, 931-32 (D.C. 1981) (in determining whether the defendant was able to pay the child support debt owed, the trial court must consider all the circumstances of the case, "including whether the defendant's asserted inability to pay is due to involuntary financial straits or a voluntary decision to reduce his or her income."). Present lack of resources is often not sufficient in itself to establish

the inability-to-pay defense. *See, e.g., Wilson v. Wilson*, 114 P.2d 737, 739 (N.M. 1941) (stating that "[t]he duty rests upon appellant to exhaust his every reasonable resource .... It is not enough that he offer mere possible excuses for his failure to meet this obligation; he must offer good and reasonable ones.").

Factors considered in the willfulness analysis may include the availability of other sources of income beyond employment. *See id.* Courts may also delve into how the parent has spent his money and/or his choices about employment. *See Niemyjski v. Niemyjski*, 646 P.2d 1240, 1241 (N.M. 1982) (finding sufficient evidence of financial ability to comply with support order where a father had used his funds for business and personal living expenses); *Shippen v. Shippen*, 693 S.E.2d 240, 243-4 (N.C. Ct. App. 2010) (basic finding of present ability to pay is minimally sufficient to defeat inability-to-pay defense); *Faught v. Faught*, 312 S.E.2d 504, 509 (N.C. Ct. App. 1984) ("[A] failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests himself or herself of assets or income after entry of the support order.").

Non-custodial parents accused of contempt face a heavy burden to excuse themselves from their child support obligations. In the face of this heavy burden, a *pro se* parent's chance of prevailing on an inability-to-pay defense is vanishingly small.

2. Significant evidence suggests that alleged contemnors frequently have meritorious inability-to-pay defenses.

The indigence and employment levels of non-custodial parents discussed above strongly suggest that many of those facing contempt simply are not able to meet their child support obligations. There is also evidence that support payments are frequently set beyond the ability of the non-custodial parent to pay. For example, a Department of Health and Human Services report issued in February 2002 stated that non-custodial parents with earnings below the poverty line were ordered on average to pay 69% of their reported earnings. *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 No. 1 Judges' J. 5, 5 (2004) ("Pearson"). *See also* Dep't of Health and Human Servs., *Child Support for Children on TANF* ii (2002), *available at* http://www.oig.hhs.gov/oei/reports/oei-05-99-00392.pdf. Federal law permits payments of only 50% to 65% of income. *See* Pearson, *supra*, at 5.

The legitimate inability of a parent to meet his or her obligation would seem the obvious defense to be raised in the context of a contempt proceeding for nonpayment of child support. In the absence of counsel, however, it appears that the opportunity to raise the defense is often missed, and large numbers of indigent parents are wrongfully imprisoned for failure to meet child support obligations every year.

There are no compiled statistics on the total number of Americans imprisoned for nonpayment of child support, yet "the limited existing data suggest

that the number is substantial." Patterson, *supra* at 117. For example, in 2003, experts estimated that in New Jersey, 300 persons were imprisoned without being provided counsel.[4] *See* May & Roulet, *supra*, at 29. A study of one county in New Mexico revealed that over a two-year period, 131 civil contemnors went to jail for nonpayment. *See* Michelle Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. Rev. 275, 277 (1984). That was in just one of 33 counties in New Mexico. These levels of incarceration, combined with the unemployment and indigence data noted above, strongly suggest that a significant number of these non-custodial parents are incarcerated not for willful failure to pay but simply because they lack the ability to pay their support obligations.[5]

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[4] In 2006, New Jersey conformed its practice to the holdings of this Court and now requires counsel to be appointed for indigent civil contemnors facing possible imprisonment. *See Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel). No more recent statistics are currently available to assess the impact of this change.

[5] While indigent alleged contemnors would be required to establish their indigence before being appointed an attorney, this analysis would not itself be duplicative of the contempt hearing. The standard for determining eligibility for appointment of counsel varies by jurisdiction and, at times, even within a jurisdiction. *See* Brennan Ctr. for Justice at NYU School of Law, *Eligible for Justice* (http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf) (2008). Generally, the standard for eligibility and the level of evidentiary support required under this standard are much lower than those required to meet the burden to establish an inability-to-pay

3. The experience of indigent parents in Georgia demonstrates the harm caused by the failure to provide court-appointed counsel.

Evidence from the state of Georgia demonstrates that indigent individuals charged with contempt are denied counsel and that this denial results in wrongful incarcerations.

In 2010, the Southern Center for Human Rights surveyed county sheriffs in Georgia to determine the number of child support contemnors confined to the state's jails solely on civil contempt charges. Responses were received from 135 of the state's 159 counties. The sheriffs who responded reported that 526 child support contemnors were confined to Georgia jails as of July 2010 on civil contempt charges. An analysis of surveys sent to 75

(*Cont'd*)
defense to avoid being jailed for contempt of court. By upholding the constitutional right to court-appointed counsel whenever incarceration is at stake, the Court would not be merely moving an existing legal analysis to an earlier stage in the process.

As noted here, the defense of a contempt charge can be exceedingly complex. By contrast, in most jurisdictions, establishing lack of resources sufficient to merit a court-appointed attorney in the first place is a relatively *pro forma* exercise. In South Carolina, for instance, an indigent defendant must simply execute an affidavit stating that he or she is financially unable to employ counsel and setting forth all his or her assets. S.C. Code Ann. § 17-3-45 (2009). A forty dollar application fee applies, but can be waived or reduced upon application to the clerk of court. *Id.* The only factor to be considered in determining whether counsel should be provided is the indigent applicant's total assets.

of these individuals found that all of them were indigent and all were jailed without counsel.

Evidence from one south Georgia jail is illustrative of the scope of the problem. As of February 2009, the county jail in Adel, Georgia held 140 people. Of those 140, just under one-third, or 45 people, were held for child support contempt. *See* Charles Shriver, *Hatley Set Free From Cook County Jail; Atlanta Group Refers to 'Debtors' Prison'*, Adel News Tribune, July 22, 2009. Of these 45 parents, 32 were men and 13 were women. *See id.* One man in the group was Frank Hatley, a 51-year-old who was jailed for 19 months for his inability to pay child support arrears. There was DNA evidence showing that Mr. Hatley was not the father of the child in question. Without legal representation at his contempt hearing, Mr. Hatley was unable to show the court that his failure to pay was not willful, and thus he was incarcerated. Also in this group were Quinton Jackson and Marquita Johnson, parents of 6-year-old K.J. Both parents were incarcerated for their inability to reimburse the state for welfare payments made to support their son. As a result of their incarceration, their child had to live with relatives.

A number of those incarcerated for contempt without having been provided counsel in Georgia are veterans returning from overseas deployments. One such individual, Lance Hendrix, age 23, was incarcerated in Cook County, Georgia after he fell behind in his child support payments for his 4-year-old daughter. *See* Contempt Order, *Dep't of Human Servs. v. Lance Hendrix*, Civ. Action No. 00-CVU-75 (Ga. Super. Ct., Cook County., May 26, 2010). Mr.

Hendrix was stationed overseas in the military until September 2009. While in the military, Mr. Hendrix had an excellent payment history. But when he returned from military service to his small, economically depressed town, he had trouble finding consistent work. His payments of $480 per month were not lowered to account for the fact that he no longer had steady employment. Mr. Hendrix worked whatever jobs he could find to pay child support – picking up pecans and scrap metal, and doing home restoration and yard work. Despite his efforts to pay, Mr. Hendrix was charged with contempt and jailed after a perfunctory hearing at which he was unrepresented by counsel. He spent four months in jail and was released in November 2010. He faces jail again if he does not pay $1,822 by February 2, 2011.

Another example, from north Georgia, similarly illustrates the inability of the indigent parents to effectively defend against contempt charges absent the appointment of counsel. Randy Miller, a 39-year-old African-American father of three and a veteran of the Iraq War, has been incarcerated in Rome, Georgia since November 15, 2010, for contempt for failure to pay child support. *See* Petition for Release from Incarceration at 1, *Dep't of Human Servs. v. Randy Miller*, Civ. Action No. 99-CV-15437C1-JFL003 (Ga. Super. Ct., Floyd County, Dec. 14, 2010). Mr. Miller served in the military reserves for fourteen years, was gainfully employed while not on active duty, and had an excellent child support payment history for well over a decade. *See id.* at 3. But he lost his job in July 2009 and has not been able to find full-time work

since. *See id.* at 4. After he lost his job, Mr. Miller continued to try to provide support for his children, making about $3,000 in payments (using money from income tax refunds and odd jobs) between July 2009 and November 2010. *See id.* at 5. In 2010, Mr. Miller's financial situation became steadily worse. *See id.* at 4. He had difficulty making his mortgage payments. Eventually, he could not even afford to keep utilities on in his home. By October 2010, Mr. Miller lost his home to foreclosure and had exhausted his savings. *See id.* His bank account contained just 39 cents. *See id.* at 5; Ex. D to Petition.

On November 11, 2010, Mr. Miller finally found a new job assembling furniture and equipment. *See id.* at 6. But just four days later, on November 15, the State ordered Mr. Miller to pay $3,000 or go to jail. *See id.* Mr. Miller appeared at the hearing *pro se*. No defense counsel was appointed. Because Mr. Miller could not pay, he was jailed. *See id.* at 6; Ex. C. There was no significant inquiry into his ability to pay at his hearing. He remains in jail today.

As these examples demonstrate, serious harm occurs when indigent parents are not appointed counsel capable of explaining the circumstances of their inability to pay child support. In the absence of the appointment of counsel, legitimate defenses are not raised effectively, and the result is that parents are wrongfully incarcerated.

4. Wrongfully incarcerating non-custodial parents who simply cannot pay does not serve the goals of contempt and visits serious, harmful consequences on the contemnor, his or her family, and the state.

The imprisonment of indigent parents without evidence of willful nonpayment is counterproductive to the goals of child support enforcement – it has no coercive effect and adversely affects the parent's children and family.

Sentencing indigent parents to imprisonment when they are simply unable to pay does not serve any coherent policy. Indeed, it is almost certain to worsen the payment situation, as the incarcerated parent is typically unable to generate income while in prison. *See, e.g., Peterson v. Roden*, 949 So. 2d 948, 950 (Ala. Civ. App. 2006) (noting that although work release programs are available, contemnors' participation may be ended for rule violations).

The New Jersey Supreme Court recently noted this point during an examination of the cases of three indigent parents who were sentenced to jail time. *Pasqua v. Council*, 892 A.2d 663, 666 (N.J. 2006) (holding that indigent contemnors were entitled to appointed counsel). The court observed at the outset that the three indigent parents in the case had not been helped at all by spending time in jail. *Id.* Anne Pasqua spent fifteen days in jail, was released without making any payment, and as of January 2003 still owed nearly $13,000. *Id.* Ray Tolbert spent seventy-one days in jail, was released without making a payment, and as of January 2003

still owed nearly $135,000 in child support. *Id.* Michael Anthony spent twenty-four days in jail and was released after paying merely $125 towards his obligation of nearly $50,000. *Id.* at 667. As of January 2003, he remained unable to make his weekly $145 payments. *Id.* As these examples make clear, indigent parents are rarely able to improve their payment history when incarcerated. Moreover, the incarcerated parent often loses his or her job as a result of the imprisonment, jeopardizing future compliance with support obligations. *See, e.g., Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

The improper imprisonment of an indigent parent can also have serious effects on the family relationships. *See generally* Patterson, *supra*, at 126. Many jails, like the one in Adel, Georgia, discussed above, *see supra* I.B.3, do not permit children to visit, so that indigent parents do not see their children for the duration of their confinement for contempt. Imprisonment may sever the parent-child relationship and result in the lack of emotional and psychological benefits that children gain from their parental relationships. *See, e.g.*, Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health & Human Servs., *The Importance of Fathers in the Healthy Development of Children* 11-13 (2006), *available at* http://www.childwelfare.gov/pubs/usermanuals/fatherhood/fatherhood.pdf.

This sad state of affairs also imposes a substantial burden on the states. For example, imprisoning three thousand individuals cost the state of Indiana approximately $186,000 *per day* a

decade ago. *See* State Prison Expenditures, Bureau of Justice Statistics, Dep't of Justice, 1 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf. If the costs of imprisonment increase at the same rate as between 1986 and 2001, then in 2016 it will cost Indiana almost $280,000 per day to incarcerate these individuals.

In sum, the consequences of the wrongful imprisonment of indigent parents may extend beyond the prison term of the parent. The family, the children, and society all pay a heavy price.

5. Evidence demonstrates that the presence of counsel helps to ensure that only those persons who willfully refuse to pay child support will be incarcerated.

The experience in one jurisdiction that provides counsel to alleged parents facing incarceration demonstrates that counsel is helpful to both the court and the parent, and ensures that only those who willfully have not paid support are sentenced to jail time. In North Carolina,[6] indigent parents facing contempt are represented through the Office of Indigent Defense Services, which has a Department of Parental Representation.[7] The office coordinates the provision of representation across

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[6] In North Carolina, courts have recognized a constitutional right to counsel for contemnors facing incarceration. *See McBride v. McBride*, 431 S.E.2d 14 (1993).

[7] The Department's web address is http://www.ncids.org/ChildSupport/ChildSupportHome.htm.

the state, although the mechanisms through which counsel are provided and the contempt processes in each county differ. Telephone Interview with Wendy Sotolongo, Parent Representation Coordinator, North Carolina Office of Indigent Defense Services, July 15, 2010 ("Sotolongo Interview"). Training is offered to lawyers on how to handle cases of alleged contempt, and the training addresses the law regarding willfulness and how to gather evidence of appropriate efforts to obtain or retain employment. *Id.* *See also* John Saxon, The Law of Contempt, May 2009 (on file with counsel). The attorneys who represent alleged contemnors also have an active email list where they can ask each other questions and share helpful precedent. Telephone Interview with Sarah Rackley, Assistant Public Defender, Durham County, North Carolina, July 23, 2010 ("Rackley Interview").

In Durham County, North Carolina, a contempt case for failure to pay begins with the issuance of an order to show cause why the individual should not be held in contempt, which must be supported by an affidavit setting forth a factual basis for the assertion that the failure to pay is willful. *Id.* Counsel is assigned to indigent defendants at the first appearance after the issuance of an order to show cause. *Id.* A pretrial conference is then scheduled for two to four weeks thereafter, giving counsel time to meet with the parent and evaluate the case. *Id.*

According to one Durham County public defender who represents alleged contemnors, the attorneys meet with their clients before the pretrial hearing to review work history, disability status,

previous incarcerations, history of child support orders, pay history and ability to pay. *Id.* She noted that the primary service an attorney provides in these cases is to help the client gather the relevant documentation and appropriate evidence, which generally concerns whether the failure to pay is willful. *Id.* For example, she asks clients to document their job search by going back to places where they have applied, obtaining copies of their applications, and following up on their prospects. *Id.* At the pretrial hearing, the attorneys often raise the issue of willfulness. *Id.* They also raise procedural issues, including the existence of multiple or conflicting orders for support and any problems with the affidavit in support of the order to show cause. *Id.*

Most cases are resolved at the pretrial hearing stage. *Id.* If a case does proceed to an adversarial hearing on the order to show cause, the hearing generally takes 10-20 minutes. *Id.* Typically, the alleged contemnor will testify about his or her living situation, work history, job search, if applicable, and the explanations for unpaid support. *Id.* Occasionally, where relevant, a case manager, probation officer or community support officer are called upon to testify. *Id.* The opposing party does not generally offer evidence beyond the history of non-payment. *Id.*

The public defender reported that, in this system, a very small percentage of alleged contemnors are incarcerated. *Id.* A larger percentage of alleged contemnors are held in contempt, but the system is fairly effective at collecting arrearages from those who can pay. *Id.*

Defense attorneys also find the system relatively effective at determining when the alleged contemnor's failure to pay was not willful and making appropriate adjustments to avoid unwarranted incarcerations. *Id.*

In other counties, the process works differently, but the outcome appears to be similar. For example, a number of more rural North Carolina counties with fewer alleged contempt cases use a lawyer-for-the-day system. Sotolongo Interview. A number of orders to show cause are set for the same day. *Id.* At the start of the proceeding, a general announcement is made about the alleged contemnors' right to counsel if they cannot afford to hire an attorney. *Id.* The alleged contemnors are then given the option of requesting counsel or waiving their right to counsel. *Id.* Those that exercise their right to counsel are assigned to a lawyer who is present and a recess is granted to permit the lawyer to speak to the client and ascertain, initially, the issues in the particular case. *Id.* Where necessary, a hearing can be rescheduled to allow the attorney to gather more evidence. *Id.*

Regardless of the type of system, there was general agreement that the presence of counsel increases the efficiency of the system, by ensuring that only those issues relevant to failure to pay are raised during the contempt proceedings. A number of attorneys who represent alleged contemnors noted that their clients frequently want to focus on some other issue in the underlying case, such as the custody arrangement or what the other spouse did wrong. *See, e.g.*, Rackley Interview. Without attorney assistance such clients would appear before

the court with the intention of trying to change the issue in the contempt hearing. They likely would be unprepared to even address the issue of the wilifulness of the failure to pay. By explaining the narrowness of the proceedings to their clients and focusing solely on the issues and evidence related to failure to pay and willfulness, the presence of defense attorneys streamlines the process and reduces the burden on the court, in addition to improving the accuracy of its outcomes.

The North Carolina example demonstrates that the presence of attorneys in contempt proceedings can increase efficiency and accuracy.

II. A CLEAR RULING THAT COUNSEL IS REQUIRED FOR ALL INDIGENT ALLEGED CONTEMNORS FACING INCARCERATION IS NECESSARY TO PREVENT WRONGFUL INCARCERATIONS AND ENSURE DUE PROCESS.

The evidence cited above demonstrates that indigent parents facing contempt are frequently denied counsel. However, the failure to provide counsel to indigent alleged contemnors is not limited to the child support context. In a number of states, indigent defendants are incarcerated for debt-related civil contempt in other contexts as well. These cases raise the same concerns about individuals being wrongfully incarcerated for significant periods of time because they simply lack the ability to pay.

Many states authorize the use of incarceration to collect court-imposed fees, fines and restitution arising out of criminal cases. *See generally* Alicia Bannon *et al.*, Brennan Ctr. For Justice, *Criminal*

Justice Debt: A Barrier to Reentry 22 & n.131 (2010), *available at* http://www.brennancenter.org/page/Fees%20and%20Fines%20FINAL.pdf (11 out of 15 states studied in report authorize incarceration for willful failures to pay criminal justice debt) and American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons ("ACLU Debtors' Prisons"). Sometimes, the mechanism for such incarceration is civil contempt. *See id.* Florida, for example, authorizes civil contempt proceedings to collect criminal justice debt in which there is no right to counsel. *See* Fla. Stat. § 938.30(9) (Any person failing "to comply with a payment schedule established by the clerk of court, may be held in civil contempt."); *see also* Rebekah Diller, Brennan Ctr. for Justice, *The Hidden Costs of Florida's Criminal Justice Fees* 15-19 (2009), *available at* http://www.brennancenter.org/content/resource/FL_Fees_report/ (describing operation of Florida's "collections courts"). In Louisiana, recently created restitution recovery divisions within prosecutors' offices are authorized to seek contempt when individuals have failed to pay probation fees, restitution, and other court costs. La. Code. Crim. Proc. Ann. Art. 895.5(C).

Ohio similarly authorizes incarceration for failure to pay a fine. *See* Ohio Rev. Code § 2947.14. While counsel is provided at the time of sentencing, counsel is generally not provided at subsequent contempt hearings. *See* ACLU Debtors' Prisons, *supra*, at 44-45. In 2006, one individual, Howard Webb, was incarcerated no fewer than four times

over a six year period for contempt resulting from failure to pay fines and court costs in criminal and traffic cases. Mr. Webb did not have counsel at any of his contempt proceedings. *Id.*

Even in states where a right to counsel for indigents facing incarceration for civil contempt has been recognized, often the right is unenforced. In Pennsylvania, for example, the state supreme court has ruled that there is a presumption that an indigent defendant is entitled to counsel in any proceeding where "he may be deprived of his physical liberty." *Commonwealth v. $9,847.00 U.S. Currency*, 704 A.2d 612, 615 (Pa. 1997) (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 26 (1981)). Likewise, the Pennsylvania Superior Court has explicitly recognized that an indigent parent facing imprisonment for nonpayment is entitled to the assistance of counsel. *See Commonwealth ex rel. Brown v. Hendrick*, 283 A.2d 722, 723-24 (Pa. Super. Ct. 1971).

Despite this clear precedent, indigent parents facing contempt charges in Pennsylvania are not being provided with counsel. For example, in Berks County, eighteen individuals were denied access to counsel and were forced to petition the Pennsylvania Supreme Court for relief.[8] *See* Application for

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[8] The Pennsylvania Supreme Court denied the petition after the county agreed to provide counsel to all "present and future indigent litigants facing incarceration for nonpayment." *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010) (order denying relief). But lawyers for the petitioners pointed out that other counties in Pennsylvania

Extraordinary Relief Under Pa. R.A.P. § 3309 and King's Bench Powers, *Cepeda v. Court of Common Pleas for the County of Berks*, No. 128 MM 2009 (Pa. 2010). Thus, even in those states that appear to provide counsel for indigent parents, the enforcement has been piecemeal.[9]

Given the risk of wrongful incarceration presented by the variety of contexts in which individuals face incarceration for "civil" contempt, it is vital that this Court reaffirm the constitutional rule that all indigent alleged contemnors facing imprisonment be provided counsel. Only through the reaffirmation of a concrete rule requiring counsel

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(*Cont'd*)
fail to appoint counsel for such litigants and expressed concern that such practices may indeed be widespread. *See id.* at 2.

[9] Over the years, despite the existence of clear precedent, this issue has come up in a number of Pennsylvania counties. While efforts to address it at the county level are sometimes successful, the litigation has not successfully addressed the recurrence of the issue in other locales. *See ACLU Applauds Pennsylvania Court Decision to Appoint Lawyers for Poor People Facing Prison*, June 9, 2004, available at http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/aclu-applauds-Pennsylvania-court-d (describing the ACLU's success in getting one Pennsylvania county to change policy and provide lawyers in child support hearings, but noting that other counties still do not provide lawyers); Larry Lewis, *Montco Revises Policy at Prison*, Philadelphia Inquirer, Dec. 12, 2003 (same). Pennsylvania is not alone in this respect. There are narrative accounts of similar practices in other states where the precedent states the appointment of counsel is required. It is for this reason that a pronouncement by the United States Supreme Court on the constitutionally required process is necessary.

be appointed in all cases where an indigent individual faces incarceration can this Court ensure civil contempt hearings across all jurisdictions are fair and effective at preventing wrongful incarceration.

By contrast, a ruling that would require appointment of counsel only on a case-by-case basis would not serve the goal of promoting fairness in civil contempt hearings. Such a case-by-case approach would leave the door open to the unfortunate possibility that jurisdictions with a history of imprisoning indigent parents without legal justification or ignoring the right to counsel even when established under state precedent might simply decline to appoint counsel in every case. A clear ruling from this Court that all indigent contemnors are entitled to counsel, whether the contempt is characterized as civil or criminal, is essential to preventing wrongful incarcerations.

III. PROVIDING COUNSEL TO INDIGENT ALLEGED CONTEMNORS FACING INCARCERATION WILL NOT IMPOSE A SIGNIFICANT BURDEN ON THE STATES.

A ruling from this Court adopting a constitutional requirement that indigent individuals facing incarceration for contempt receive appointed counsel would not impose a heavy burden on the states. As demonstrated by the Petitioner, many states already have statutory or court-made rules that provide counsel to indigent parents facing imprisonment, which represent the bulk of such contempt cases. Pet. 16-18. These states will be

unaffected by a constitutional ruling from this Court. Such a ruling would result in changes only in the small minority of states that have rejected the right to counsel in this context or that have failed to enforce the right.

Even those states with the minority view would not be unduly burdened by a new constitutional rule, as they would have several options as to how to approach such a ruling from this Court. Most obviously, they could simply provide counsel as they do to criminal defendants, as the North Carolina example demonstrates. An additional option would be to take imprisonment off the table. Different states can experiment differently, yet no individual will be sent to prison without the assistance of counsel.

While most states provide counsel and would not be affected, a clear ruling from this Court would help make uniform the enforcement of the right to counsel across the country. Wherever personal liberty is at stake, indigent parents deserve court-appointed counsel, regardless of whether the hearing is technically categorized as "civil" or "criminal."

This Court has an obligation to ensure that the process by which these alleged contemnors are jailed complies with constitutional norms. *Amici curiae* respectfully request that the Court address the grave problem of wrongful incarceration by implementing a constitutional rule to ensure that all indigent parents, in all states, are afforded the right to counsel in the face of potential incarceration. Such a solution would protect the rights of many of

the most vulnerable without imposing an undue burden on the states.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to rule that indigents have a right to appointment of counsel in civil contempt hearings whenever they face imprisonment.

Respectfully submitted,

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647

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. SOUTH CAROLINA'S CHILD SUPPORT CIVIL CONTEMPT SYSTEM CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT	5
A. Observations Of Hundreds Of Civil Contempt Hearings In South Carolina Suggest That Many Indigent Obligors Risk Being Incarcerated For Contempt Despite Their Inability To Pay	5
B. The Observed Hearings Showed That Parent-Debtors Without Counsel Were Held In Contempt More Than Twice As Often As Those Represented By Counsel	10
C. The Observed Hearings Showed That Parent-Debtors Needed Counsel To Navigate The System And Present Their Available Defenses	13
II. PROVIDING COUNSEL SHOULD SAVE SOUTH CAROLINA AND ITS COUNTIES MONEY AND BETTER ENSURE THAT CHILDREN RECEIVE NEEDED FINANCIAL SUPPORT	22

TABLE OF CONTENTS—Continued

Page

A. The Cost Of Detaining Child Support Obligors Is Staggering 22

B. Incarceration Creates A Counterproductive Cycle Of Nonpayment And Contempt And Precludes Implementation Of More Efficient, Constructive Alternatives 27

C. Incarceration Negatively Affects Noncustodial Family Relationships 30

CONCLUSION 32

TABLE OF AUTHORITIES

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341 S.E.2d 130 (S.C. 1986) 16

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Page

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Page

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Page

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TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF *AMICI CURIAE* [1]

Amicus curiae Elizabeth G. Patterson is the former State Director of the South Carolina Department of Social Services, the agency that administers the child support enforcement program in South Carolina. After heading that agency for four years, in 2003 she returned to the faculty of the University of South

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief, except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

Carolina School of Law, where she has been a Professor of Law since 1980. Professor Patterson specializes in child and family law issues, and her scholarship has focused extensively on federal and state child support enforcement programs and their impact on low-income noncustodial parents. She has conducted both empirical and scholarly research on South Carolina's child support enforcement system, some of which is discussed in this brief. Given her real-world experience and scholarship, Professor Patterson has a unique and informed perspective on South Carolina's child support enforcement system that she believes may be of assistance to the Court.

Amicus curiae South Carolina Appleseed Legal Justice Center ("SC Appleseed") has engaged in advocacy and education for over twenty years aimed at ensuring that South Carolina legislation addresses the interests of the underprivileged. SC Appleseed has a long history of working with the courts and the South Carolina Bar to improve access to legal representation and currently has a seat on the South Carolina Supreme Court's Access to Justice Commission. SC Appleseed has published a large number of educational materials for low-income persons, including guidance for parents involved in South Carolina's child support enforcement system. Given its experience with that system and those directly affected by it, SC Appleseed believes its perspective may be helpful to the Court.

SUMMARY OF ARGUMENT

I. This Court has long recognized the "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). That truth is borne out every day in family courts across South Carolina. A 2010 observational study of hundreds of South Carolina child support contempt hearings, for instance, revealed the following:

- Over 98% of parents held in "willful" contempt were not represented by counsel.
- At least 95% of all contemnors were sentenced to jail; the average sentence imposed was three months.
- Over 75% of all contemnors testified that they were presently or previously unemployed or having difficulty finding work.
- Parents who appeared without counsel were held in contempt *more than twice as often as parents who were represented by counsel.*

The observational study also suggested why the assistance of counsel, or lack thereof, made such a difference to these parents. The hearings had an assembly-line pace lasting just over three minutes on average, with few hearings lasting longer than six minutes. On pointed questioning from judges and social services lawyers, parent-debtors often struggled to clearly articulate a key defense that many of them undoubtedly had: an inability to pay the amount due. In several counties, courts imposed identical sentences or purge amounts for almost

every contemnor, suggesting that no meaningful attempt was made to consider the contemnor's particular circumstances. Without the guiding hand of counsel "to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether [the parent-debtor] has a defense," *In re Gault*, 387 U.S. 1, 36 (1967), contempt sanctions for many of these parents were inevitable.

II. Recent data also reveals one of the unintended consequences of South Carolina's system, which denies counsel to those accused of civil contempt: South Carolina's jails are filled with family court contemnors, creating a modern day debtors' prison for poor noncustodial parents who lack the ability to pay support. Surveys of county jail administrators and sheriffs in 2005 and 2009, for example, reported that 13% to 16% of the total jail population was made up of family court contemnors. Publicly available jail expenditure reports indicate that the cost to detain these individuals is staggering. Meanwhile, these incarcerated contemnors are prevented from earning the income they need to pay past-due child support and avoid the State's automatic contempt process from starting anew when they are released from jail.

The assistance of counsel in child support contempt proceedings could not only prevent the improper detention of those who genuinely are unable to pay, but also could help broker alternatives to incarceration, including programs that already have proven more effective at promoting sustainable employment and reimbursing the State and custodial parents for unpaid child support. At the same time, such alternatives help break the recurring cycle of incarceration that diminishes prospects for employment and deprives children of an opportunity to build a

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relationship with their incarcerated noncustodial parents.

While more research is needed, the recent observational study and survey data present a compelling case that petitioner Michael Turner's experience with South Carolina's system is hardly atypical. And the data reflects the truism that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

ARGUMENT

I. SOUTH CAROLINA'S CHILD SUPPORT CIVIL CONTEMPT SYSTEM CREATES A HIGH RISK THAT INDIGENT PARENTS WILL BE INCARCERATED DESPITE THEIR INABILITY TO PAY THE ORDERED SUPPORT.

A. Observations Of Hundreds Of Civil Contempt Hearings In South Carolina Suggest That Many Indigent Obligors Risk Being Incarcerated For Contempt Despite Their Inability To Pay.

1. In the decision below, the South Carolina Supreme Court justified denying petitioner and other noncustodial parents the right to counsel in civil contempt proceedings—even where those proceedings result in incarceration—based on the theory that these parents "hold the keys to [their] cell" because they could "avoid the sentence by having a zero balance on or before [their] release." Pet. App. 3a-4a. This conclusion rests on the supposition that *all* child support contemnors are correctly found to have willfully skirted their responsibilities. *See* Pet. Br. 40-42.

That premise defies reality. Researchers have estimated that "at least 16.2 percent and possibly as much as 33.2 percent of young noncustodial fathers do not pay child support and are unable to do so without further impoverishing themselves or their families." Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. Pol'y Analysis & Mgmt. 44, 47 (1998); *accord* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J.L. & Pub. Pol'y 95, 107 (2008) (discussing other estimates). Courts and commentators have referred to these indigent parents as "turnips" because—contrary to the assumption that all obligors are "deadbeat dads"—many noncustodial parents could more aptly be described by the phrase, "you can't get blood out of a turnip." Patterson, *supra*, at 125 (quoting an Ohio trial court judge).

Surveys of South Carolina sheriffs and jail administrators conducted in 2005 and 2009 by *amicus* Professor Elizabeth G. Patterson of the University of South Carolina School of Law indicated that 13% to 16% of the total detainee population consisted of family court contemnors. Although there is little hard data on the circumstances of these contemnors, a 2010 observational study of South Carolina family court contempt proceedings by Professor Patterson suggests that a large percentage of noncustodial parents who are held in contempt and ordered incarcerated are too poor to hold the keys to their jail cell.

From June through August 2010, Professor Patterson's researcher observed child support contempt hearings for 326 parent-debtors ("the 2010 Patterson Study" or "the Study"). Hearings were observed in family courts in thirteen counties across South Caro-

lina, representing a cross-section of the State's geographical regions, county demographics, and judicial districts.[2] The Study recorded specified information about the parent-debtors and the hearings. Approximately 67% of the noncustodial parent-debtors observed during these proceedings were black, 30% were white, and the remaining 3% were of another or unspecified race. Almost 12% of the parent-debtors were women.

Of the 326 obligors, less than 4% (twelve obligors) were represented by counsel at their hearings. A large percentage of all obligors were held in contempt, although the contempt rate varied significantly by county.[3] Among the thirteen county family courts observed, the contempt rates ranged from 0% to 86%, with over one-third of those courts holding 60% or more of the obligors in contempt. Across all courts, the overall contempt rate was almost 41% (133 of 326).[4] Of that 41%, at least 95% (127 of 133) of the parent-debtors were sentenced to a period of

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[2] The thirteen counties were Aiken (June 30, 2010), Anderson (Aug. 3, 2010), Charleston (July 21, 2010), Edgefield (July 13, 2010), Fairfield (June 22, 2010), Florence (July 16, 2010), Greenville (July 14, 2010), Hampton (July 15, 2010), Horry (Aug. 2, 2010), Marlboro (July 20, 2010), Orangeburg (July 28, 2010), Richland (June 10, 2010), and Sumter (June 29, 2010).

[3] Although thirty-five obligors appeared for contempt hearings on multiple child support orders, only two of them had "split decisions," in that they were held in contempt on one order but not on the other. For purposes of data analysis, these two obligors were counted among those who were held in contempt.

[4] Not all of the remaining obligors necessarily escaped a contempt sanction. For at least 11% of obligors (36 of 326), the courts continued the proceedings. The remaining 157 obligors, or 48%, were found not to be in contempt.

incarceration. As discussed in more detail below, the average imposed sentence was three months.[5] The average purge amount that these contemnors would have to pay to secure their release was just over $1,100.[6]

2. The 2010 Patterson Study provides persuasive evidence that a large proportion of the parents held in contempt were indigent. Over 75% of all contemnors (101 of 133) testified either that they:

- were unemployed at the time of the hearing;
- could not find steady work; or
- previously had difficulty finding work.[7]

Many of these individuals attributed their financial difficulties to a lack of employment opportunities, disabilities and health issues, or past incarceration.

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[5] Sentencing data was recorded for all but two of the contemnors.

[6] Purge amounts were recorded for 114 of the 133 contemnors.

[7] Many contemnors, particularly the unemployed and underemployed, appeared to have arrearages disproportionate to their earning capacity. For example, the Study recorded that at a July 2010 hearing in Orangeburg County, an obligor with over $26,000 in arrears explained that he had been looking for work since 2008, when he last paid child support. Although he had found work on a roof repair job the week before the hearing, he testified that he earned only enough to pay for the cost of his tools. The court held him in contempt, sentenced him to six months in jail, and set a purge amount of $5,000.

As petitioner explains, high arrearages are not uncommon among low income obligors, due to a variety of flaws in the child support enforcement system, including the practice of imputing income to low-income obligors pursuant to standardized formulas and retroactively applying child support obligations. *See* Pet. Br. 8 n.5, 9.

While the Study examined only a small cross-section of South Carolina parents subject to contempt hearings, its observations are consistent with national data concerning delinquent child support obligors. *See* Office of Child Support Enforcement, Dep't of Health and Human Servs., *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 4 (July 2004), *available at* http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28a.pdf (finding that 70% of child support debt is owed by noncustodial parents with earnings less than $10,000 per year or no quarterly income at all); Patterson, *supra*, at 106 (discussing another study that "found that fewer than one in five such [low-income noncustodial fathers] have full-time, year round work . . . [and that these fathers] earned an average of $4,221 annually").

Michael Turner's case exemplifies what the 2010 Patterson Study recorded over the course of hundreds of contempt proceedings. At his January 2008 contempt hearing, Turner testified that his non-payment was due to his physical disability and drug addiction, both of which limited his earning potential. *See* Pet. App. 17a. The court held him in contempt and sentenced him to a term of imprisonment not to exceed twelve months, the statutory maximum. J.A. 60a-62a; *see also* S.C. Code Ann. § 63-3-620. While his appeal of that sentence was pending, he was brought into court again in April 2009 for his child support arrearage. There, Turner explained that despite looking for jobs in the four months since his release from jail, he was unable to find any work. The judge asked Turner two questions about where he lived, and then found him in "willful contempt" and sentenced him to six months incarceration subject to a purge amount of $2,500 plus a 5% court

fee. J.A. 86a, 90a-91a. Given Turner's financial condition, the purge amount may as well have been $1 million.

B. The Observed Hearings Showed That Parent-Debtors Without Counsel Were Held In Contempt More Than Twice As Often As Those Represented By Counsel.

1. The 2010 Patterson Study reinforces the "obvious truth" that the assistance of counsel can be a significant factor in a child support obligor's success in avoiding both a contempt finding and incarceration, and that self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant . . . ." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). The Study observed a distribution of contempt rulings that suggests the decision-making process in South Carolina family courts is skewed against noncustodial parents who appear without counsel in child support contempt hearings.

Of the 326 obligors observed during the Study, less than 4% (twelve obligors) were represented by counsel. And obligors who appeared without counsel were held in contempt more than twice as often as obligors who were represented by counsel. Only 17% of obligors with attorneys (two of twelve) were held in contempt.[8] By contrast, 42% of unrepresented obligors (131 of 314) were held in contempt.

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[8] In both cases where the obligor had counsel but was held in contempt, the evidence reflected that the obligor had an income stream. At a June 2010 hearing in Richland County, one of the represented obligors was employed and had a longstanding child support debt. The other represented contemnor, whose hearing

The discrepancy in contempt rates between obligors with lawyers and those without lawyers does not appear to be attributable to the obligors' economic circumstances. Rather, the Study suggests that, as a group, parent-debtors with counsel were no better off financially than the unrepresented obligors. At least four of the parents with counsel were unemployed, and at least two of the four parents who had jobs were not earning a significant income.[9] At a July 2010 hearing in Greenville County, for example, a parent who was represented by counsel testified that she made $250 per week as a chain restaurant waitress. The court did not hold her in contempt. Later that month at a Charleston County hearing, another parent who was represented by counsel testified that he was a truck driver making half of what he used to because of a company-wide reduction in schedules. He was not held in contempt. By contrast, the researcher observed case after case where unrepresented individuals with similar circumstances were sentenced to jail.

2. Although many parents who appeared without lawyers were not held in contempt, these outcomes were not necessarily attributable to the obligors' efforts at self-representation. The Study recorded that the thirteen family courts varied widely in their contempt rates, from 0% to 86%. There are any number of reasons for such divergent outcomes. One possibility is that each court differed – perhaps due to

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was in Horry County in August 2010, was unemployed but had a monthly military pension. In his case, an agency lawyer at the hearing informed the court that the child support order originated in another state, which had requested enforcement.

[9] Employment data was not recorded for another four obligors who had counsel.

caseload or experience with the effectiveness (or ineffectiveness) of contempt as a means of securing payment – in how it exercised its broad discretion to determine whether an obligor proved that his or her failure to comply with the child support order was not willful. This is precisely the type of discretionary finding that is vulnerable to the "arbitrary exercise of judicial power," and for which the assistance of counsel is "both necessary and appropriate" to protect against punitive contempt sanctions. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 834 (1994).

Moreover, the Study also strongly suggests that regardless of the hearing outcomes, many of the obligors – whether represented or not – were similarly situated with respect to their inability to pay. Overall, 68% of all obligors (223 of 326) testified either to past or present unemployment or under-employment. Substantial majorities of contemnors (76%, or 101 of 133) and non-contemnors (63%, or 122 of 193) testified to the same effect. Thus, whatever the reasons that some of the parents observed during the 2010 Patterson Study were able to muddle through the system and escape incarceration, the fact remains that parents without lawyers were over twice as likely to be held in contempt as similarly situated parents who had the assistance of counsel.

C. The Observed Hearings Showed That Parent-Debtors Needed Counsel To Navigate The System And Present Their Available Defenses.

1. Profile Of A South Carolina Child Support Civil Contempt Proceeding

South Carolina family courts administer all child support cases that involve the State's Department of Social Services ("DSS"). Most child support contempt proceedings are initiated by the clerk of court, pursuant to South Carolina Family Court Rule 24, entitled "Automatic Enforcement of Child Support and Periodic Alimony."[10] The Rule empowers the clerk both to determine arrearages and to compel an obligor to appear in court. The clerk conducts a monthly review of child support accounts and determines the arrearage based on whether scheduled payments are late by five days or more. S.C. R. Fam. Ct. 24(a). For any overdue payments, the clerk issues a "rule to show cause" and an affidavit identifying the child support order at issue and the amount of arrearages accrued. S.C. R. Fam. Ct. 24(b). The rule to show cause, which has "the same force and effect as a rule to show cause issued by a judge," also sets a hearing date and directs the parent-debtor to attend. *Id.*

At a Rule 24 hearing, the family court judge may find a parent-obligor in contempt if the parent was in "willful disobedience" of the prior child support order, in that he or she "voluntarily and intentionally" and

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[10] For child support or alimony orders not administered by the court, the noncustodial parent must commence his or her own rule to show cause. Stephanie G. Borsanyi, *Rules to Show Cause*, 19 Nov. S.C. Law. 16, 21 (2007).

"with specific intent" failed to pay as ordered. *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 370 S.E.2d 872, 874 (S.C. 1988) (quoting Black's Law Dictionary 1434 (5th ed. 1979)); *accord* S.C. Code Ann. § 63-3-620. The clerk's records, as reflected in the affidavit, constitute *prima facie* evidence that the parent has not complied with the court's prior child support order. *See S.C. Dep't of Soc. Servs. v. Johnson*, 688 S.E.2d 588, 592-93 (S.C. Ct. App. 2009). Once the clerk's affidavit establishes the parent's disobedience of the child support order, *see id.*, the burden shifts to the parent-debtor to establish that his or her disobedience was not willful. *Pratt v. S.C. Dep't of Soc. Servs.*, 324 S.E.2d 97, 98 (S.C. Ct. App. 1984). A parent's lack of willfulness—such as a financial inability to pay—thus becomes a key factual question at the contempt hearing.

Family courts in South Carolina generally hold civil contempt hearings on specific days that are set aside for that purpose. The 2010 Patterson Study observed hundreds of such hearings in thirteen different counties. Though the procedures varied, the hearings tended to follow a similar process. The hearings had an assembly-line pace, lasting only about three minutes on average, with few hearings lasting more than six minutes. They typically commenced when either the clerk or the judge called a debtor (or group of debtors) by name and then swore-in the debtor (or group). In all observed hearings, an attorney for DSS was present, usually sitting at opposing counsel's table. The DSS attorney often was assisted by a DSS staff member with computer access to information in the agency's database.

Once the parent-debtor was before the court, the proceedings routinely turned to an examination of the parent-debtor's economic circumstances. In most counties, the questioning was performed primarily by the judge, although on the day proceedings were observed in Charleston County, the DSS attorney took a principal role in the questioning. Even when DSS attorneys did not lead the questioning, however, these agency lawyers often participated in the proceedings. Across all counties, in about one-quarter of the obligors' hearings (76 of 326), for instance, a DSS attorney directly questioned the parent-debtor, answered questions posed by the court, confirmed or contradicted the obligor's testimony, or informed the court of the outcome desired by DSS.

As discussed below, the observed proceedings demonstrate that a child support obligor needs a lawyer "to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense . . . ." *In re Gault*, 387 U.S. at 36.

2. Counsel's Assistance Is Needed To Identify Administrative And Procedural Errors.

The assistance of counsel provides an essential check on the inevitable administrative errors that arise at the inception of South Carolina's automated child support enforcement process. As noted, the process begins when a parent's name appears on a list of late-payors and the clerk issues a rule to show cause and affidavit that constitute *prima facie* evidence of the arrearage and the parent's non-compliance. Lacking an attorney's ability to navigate the law, procedures, and administration of large

agency programs, a layperson cannot be expected to challenge the presumption of regularity that attaches to these court records.

For example, the 2010 Patterson Study recorded that during a July hearing in Marlboro County, it was revealed that, due to an administrative error, a noncustodial parent never received notification that he should have been paying child support. The court discovered this mistake only because a DSS lawyer identified the error and requested that the court not hold the obligor in contempt and instead continue the hearing due to the lack of notice. Similar errors that a layperson would be hard-pressed to raise include computational errors in the amount purportedly owed, jurisdictional defects in the underlying support order, or defects in the rule to show cause affidavit. *See Brasington v. Shannon*, 341 S.E.2d 130, 131 (S.C. 1986).

3. Counsel's Assistance Is Needed To Present An "Inability To Pay" Defense.

Counsel also would help the parent-debtor prepare a proper defense and satisfy his or her burden of proof on the crucial issue of inability to pay. To satisfy the burden of proof, a parent-debtor might be expected to present evidence of "his or her employment (or lack thereof), wages, expenses and assets." Patterson, *supra*, at 120; *see also Hicks v. Hicks*, 312 S.E.2d 598, 599-600 (S.C. Ct. App. 1984). Although this burden may sound "simple, orderly and necessary to the lawyer," to the untrained layman it "may appear intricate, complex and mysterious." *Johnson*, 304 U.S. at 463. Thus, "[e]ven the simplest 'inability to pay' argument requires articulating the defense, gathering and presenting documentary and other

evidence, and responding to legally significant questions from the bench—tasks which are 'probably awesome and perhaps insuperable undertakings to the uninitiated layperson.'" Patterson, *supra*, at 121 (quoting *Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006)). In the proceedings observed in the 2010 Patterson Study, for instance, parent-debtors held in contempt routinely did not bring documents or other evidence that might corroborate their testimony about their circumstances.

The burden is even greater when a fact-finder requires proof not only that the obligor was unemployed, but also that the unemployment was not voluntary. Such proof might consist of evidence concerning the local unemployment rate, the basis for dismissal or departure from a previous job, subsequent efforts to find employment, or the effect on employability of various personal "barriers to employment," such as limited education or work skills, addictions, physical or mental health problems, or a criminal record. Patterson, *supra*, at 105-06 ("Studies have shown that large proportions of poor non-custodial fathers lack a high-school degree or GED, have criminal records, and suffer from health conditions that limit the kind or amount of work they can perform."); *see also id.* at 120-21. A layperson's attempt to meet this burden is no substitute for a trained lawyer's ability to identify and convey the relevant information to the court. For example, in a July 2010 hearing in Hampton County, an unemployed parent-debtor explained that he was laid off two years earlier and that he suffered from schizophrenia. He brought his mother, who corroborated that he was disabled. He was held in contempt and sentenced to thirty days in jail.

Additionally, parent-debtors may have other dependents for whom they are responsible, Patterson, *supra*, at 120 n.171, and whose needs should be considered in determining the obligor's ability to pay. At an August 2010 hearing in Anderson County, one parent-debtor explained that he was laid off from his job soon after paying the purge amount set at a previous contempt hearing. Although he since had found other employment, he testified that there was insufficient work at his new job for him to support the three children in his own household as well as the two others for whom he was paying child support. He was held in contempt and sentenced to thirty days in jail. On that same day, the Anderson County court also held in contempt a parent-debtor who was brought to the court from jail wearing his orange jumpsuit. The court held him in contempt even though he was only two weeks into a separate ninety-day child support contempt sentence with obviously no ability to earn money to pay the past due support. The significance of these types of circumstances may go unnoted without an attorney's explanation, argument, and assistance to identify and present corroborating evidence and witnesses.

4. Counsel's Assistance Is Needed To Shape An Appropriate Contempt Sanction.

Even if an obligor is held in contempt, an attorney's skills and knowledge can still help ensure that the court's determination of the purge amount and jail sentence is realistic in light of the obligor's economic circumstances. South Carolina law gives the family court judge broad discretion in sentencing a parent-debtor for willful failure to pay, including the ability to impose imprisonment of up to one year and up to a

$1,500 fine. *See* S.C. Code Ann. § 63-3-620. Because the court may use incarceration only as a means of coercing compliance with the child support order, the court may impose a jail sentence only if the contemnor can comply with the support order and thus purge the contempt. If the parent-debtor lacks the ability to comply, then he or she cannot be incarcerated in a civil proceeding. Given the three-minute average hearing length recorded by the 2010 Patterson Study, it is unlikely that an obligor could, without a lawyer's help, focus the court's sentencing analysis upon the actual proportion of the arrearage, if any, that the obligor could realistically pay *at that time* as a purge amount.

Apart from observing the lack of inquiry into the parent-debtor's present ability to pay, the 2010 Patterson Study revealed that the purge amounts often were not tailored to the contemnor's circumstances. The Study found that purge amounts varied significantly from county to county, ranging from a few dollars to over $10,000, with the average amount just over $1,100. In many individual counties, however, it appeared that no attempt was made to determine a reasonable purge amount based on the parent's individual circumstances. For example, in Hampton County, every recorded purge amount was set at $500, except for two hearings where the amounts of the underlying arrearage were less than $500. In other counties, the purge amount was set as a proportion of the arrearage; for example, the Richland County court set the purge amount at 10% to 20% of the outstanding arrearage. And in Florence County, the court routinely set the purge amount at the full amount owed by the obligor. In Michael Turner's case, the Oconee County court used this

same approach, setting the purge amount at the full $5,728.76 Turner owed in arrears. J.A. 61a.

Similar approaches were recorded concerning sentencing practices. The 2010 Patterson Study recorded that the length of incarceration varied from county to county, ranging from 0 to 365 days, with an average sentence of three months. In several individual counties, however, courts appeared to use a one-size-fits-all approach to sentencing, suggesting that no meaningful attempt was made to base the sentence on the particulars of the case or the parent's circumstances. For example, all sixteen contemnors in Hampton County were sentenced to thirty days in jail, while each of the twenty-two contemnors in Charleston, Greenville, and Horry Counties received six-month sentences.

Counsel also can play an important role in negotiating settlements that could promote the goal of increasing child support payments while avoiding the counterproductive step of incarcerating the obligor. Such settlements might involve job training or job placement assistance, vocational rehabilitation programs, treatment for addictions or health problems, or other actions designed to improve the obligor's earning capacity. *See* S.C. Code Ann. §§ 63-17-490, 63-17-500; *see also infra* at 29-30 (discussing Alternative to Incarceration program). Petitioner Turner, for example, was incarcerated at least five times when he appeared at contempt proceedings without the aid of counsel. Pet. Br. 9-15. But at petitioner's 2010 contempt proceeding, *pro bono* counsel was able to negotiate a suspended jail

sentence conditioned on completion of a substance abuse program. Pet. Br. 15 n.10.[11]

Finally, given the wide discretion available to the courts in these cases, and the family court's "continuing supervisory role" over an indigent parent's most intimate economic affairs, *Bagwell*, 512 U.S. at 842 (Scalia, J., concurring), the right to counsel is an essential safeguard against the constant threat of erroneous incarceration. *Id.* at 834. The only check on the courts' discretion is the deferential "abuse of discretion" standard of appellate review. *See Durlach v. Durlach*, 596 S.E.2d 908, 912 (S.C. 2004). It goes without saying that an unrepresented parent is ill-equipped to understand or build any record for an appeal. And even if they could find a *pro bono* lawyer to file one, appellate courts do not lightly "disregard the family court's findings" because they conclude "that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." *Johnson*, 688 S.E.2d at 590.

The hundreds of proceedings observed in the Study reflect the obstacles that uncounseled South Carolina obligors faced in presenting defenses and preserving their physical liberty. In a courtroom filled with skeptical representatives of the State's executive and judicial branches, an attorney who is trained to clearly and precisely articulate the relevant facts may be effective in a proceeding that averages only three minutes. But it is inevitable that many layper-

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[11] That petitioner was subsequently jailed when he did not complete the substance abuse program does not detract from the fact that the opportunity to benefit from such a program arose only through the efforts of his attorney.

sons will be "overwhelm[ed]" by the "distressing and disorienting situation" of a rushed contempt hearing. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30 (1981).

II. PROVIDING COUNSEL SHOULD SAVE SOUTH CAROLINA AND ITS COUNTIES MONEY AND BETTER ENSURE THAT CHILDREN RECEIVE NEEDED FINANCIAL SUPPORT.

Recent data also reveals one of the potential consequences of denying counsel to those accused of civil contempt: South Carolina's jails are filled with family court contemnors, creating a modern day debtors' prison for poor noncustodial parents who lack the ability to pay support. South Carolina's current approach to child support enforcement is penny wise and pound foolish; providing counsel to indigent noncustodial parents in South Carolina likely would *save* the State and local governments significant resources. At the same time, it would facilitate, rather than hinder, the provision of needed child support.

A. The Cost Of Detaining Child Support Obligors Is Staggering.

Child support contemnors comprise a significant portion of South Carolina's jail population. In 2005 and 2009, Professor Patterson surveyed county sheriffs and jail administrators across South Carolina to determine what proportion of the State's jail population consisted of child support contemnors confined on civil contempt charges ("the 2005 and 2009 Patterson Surveys"). Each response reported the total number of inmates and the number of those inmates who were "family court detainees" on the particular day the report was completed, according to

survey participants, "family court detainees" consisted exclusively of civil contemnors and primarily of child support contemnors.[12] Complete responses were received from jails serving thirty-one of the State's forty-six counties in 2005, and from thirty-three counties' jails in 2009. Only three small counties failed to respond to either survey.[13]

In 2005, the sheriffs and administrators reported a total jail population of 8,251 for thirty-one counties, of which 16.2% (1,335) were "family court detainees." The figures were similar in 2009: the total jail population was 9,537 for thirty-three counties, of which 13.2% (1,259) were family court detainees.[14] These numbers paint a striking portrait: Nearly one out of every six to eight individuals in county jails were family court civil contemnors. Some individual county jails had even higher proportions of these contemnors. In 2009, jails serving eleven counties reported that family court detainees made up almost one-fifth or more of the jail population.[15]

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[12] A small number of "family court detainees" reportedly were persons in arrears on alimony payments, who are also subject to South Carolina Family Court Rule 24.

[13] Those counties were Bamberg, Fairfield, and Union. In 2009, the total estimated population of these three counties was almost 66,000, out of a statewide estimated population of approximately 4.6 million. *See* U.S. Census Bureau State Population by County, *available at* http://quickfacts.census.gov/qfd/states/45000.html.

[14] A jail serving two additional counties responded to the 2009 Survey by providing the number of family court detainees, but not the total number of all detainees. That jail's response has been excluded from this analysis.

[15] These jails served the counties of Aiken, Barnwell, Berkeley, Clarendon, Dorchester, Greenwood, Lee, Jasper, Pickens, Sumter, and York.

The cost to confine these parents is significant. For example, Charleston County—a large jurisdiction—expended over $29 million to operate its jails in 2009.[16] On the day that its jail officials responded to the 2009 Survey, Charleston's jail housed 1,644 prisoners, almost 16% of whom were family court detainees. The data is similar for rural counties such as Anderson County, which spent over $5 million on its detention center;[17] its 2009 Survey response indicated that 12% of its jail was filled with family court detainees. And Oconee County, where petitioner Turner was incarcerated, appropriated $2,472,964 to fund its detention center in 2009.[18] Although the Oconee County jail did not respond to the 2009 Survey, it reported in 2005 that almost 17% of its inmates were family court detainees.

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[16] *See* Charleston County Approved Budget Detail FY 2011 at 63-65 ("Charleston Budget"), *at* http://www.charlestoncounty.org.

[17] *See* Anderson County Annual Operating and Capital Budget FY 2009 at 180-81, *at* http://www.andersoncountysc.org.

[18] *See* Oconee County General Fund Budget Summary FY 2010 at 25-27, *at* http://www.oconeesc.com.

Amici were able to locate fiscal year 2009 jail expenditures for twenty-one of the counties that responded to the 2009 Survey.[19] The table below displays these counties' jail costs, the number of total detainees that they reported, and the corresponding numbers and percentages of family court detainees.

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[19] *See* Charleston Budget, *supra* note 16, Anderson Budget, *supra* note 17, *see also* Aiken County Budget Ordinance FY 2009 at vii, *at* http://archive.aikencountysc.gov; Beaufort County Comprehensive Annual Financial Report at 77, *at* http://www.bcgov.net; Berkeley County Interim Financial Statement 2010 at 8, *at* http://www.berkeleycountysc.gov; Clarendon County Budget Summary FY 2011 at 19, *at* http://www.clarendoncounty.sc.gov; Dorchester County Budget FY 2011 at 276, *at* http://www.dorchestercounty.net; Florence County Comprehensive Annual Financial Report FY 2009 at 175, *at* http://files.florencecc.org; Georgetown County Audited Financial Statement FY 2009 at 63, *at* http://www.georgetowncountysc.org; Greenwood County Comprehensive Annual Financial Report FY 2009 at 59, *at* http://www.greenwoodsc.gov; Horry County Comprehensive Annual Financial Report FY 2009 at 87, *at* http://www.horrycounty.org; Jasper County Comprehensive Annual Financial Report FY 2009 at 45, *at* http://www.jaspercountysc.org; Kershaw County Comprehensive Annual Financial Report FY 2009 at 57, *at* http://www.kershaw.sc.gov; Laurens County Report on Financial Statements FY 2009 at 38, *at* http://www.sccounties.org; Lexington County Comprehensive Annual Financial Report FY 2009 at 115, *at* http://www.lex-co.com; Newberry County Audit Report FY 2009 at 28, *at* http://www.newberrycounty.net; Pickens County Comprehensive Annual Financial Report FY 2009 at 55, *at* http://www.co.pickens.sc.us; Richland County Annual Budget FY 2011 at 77, *at* http://www.richlandonline.com; Spartanburg County Adopted Operating Budget FY 2009 at 28, *at* http://www.spartanburgcounty.org; Williamsburg County Budget Highlights FY 2009, *at* http://www.williamsburgcounty.sc.gov; York County Comprehensive Annual Financial Report FY 2009 at 67, *at* http://www.yorkcountygov.com.

County	*FY 2009 Jail Costs*	*2009 Detainees*	*2009 Family Court Detainees & Percentage of Total*
Charleston	$29,063,891	1644	255 (15.5%)
Richland	$19,929,824	957	61 (6.4%)
Horry	$14,928,960	631	36 (5.7%)
Spartanburg	$13,461,869	647	71 (11%)
Lexington	$11,385,599	882	70 (7.9%)
Beaufort	$6,597,248	318	32 (10.1%)
York	$6,439,058	145	49 (33.8%)
Florence	$6,133,251	479	36 (7.5%)
Anderson	$5,351,375	368	43 (11.8%)
Aiken	$4,615,082	406	85 (20.9%)
Dorchester	$4,239,010	244	53 (21.7%)
Jasper	$3,536,155	102	20 (19.6%)
Georgetown	$3,140,762	197	10 (5.1%)
Berkeley	$2,617,589	399	105 (26.3%)
Laurens	$2,123,716	188	32 (17%)
Greenwood	$2,039,927	178	40 (22.5%)
Clarendon	$1,915,788	71	16 (22.5%)
Kershaw	$1,657,994	86	16 (18.6%)
Newberry	$1,609,836	93	17 (18.3%)
Williamsburg	$1,452,725	98	8 (8.2%)
Pickens	$1,225,627	88	21 (23.9%)
TOTAL	**$143,465,286**	**8,218**	**1,076 (13.1%)**[20]

[20] The 13.1% family court detainee population for the twenty-one counties listed above is consistent with the 2009 Survey's

As shown, these twenty-one counties' jail costs totaled over $143 million. On average, they spent over $17,000 per reported detainee. This corresponds with the South Carolina Department of Corrections' reported combined State and federal expenditures of over $16,000 per post-conviction prisoner. *See* S.C. Dep't of Corrections, Costs Per Inmate Fiscal Years 1988-2009, *available at* http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2009.pdf; *see also* Pet. Br. 49 (citing State portion of expenditures). Considering that these twenty-one counties alone reported over 1,000 family court detainees, with most being child support contemnors, it is clear that South Carolina spends considerable amounts of money jailing parents who lacked the assistance of counsel when they were determined to have been in "willful" contempt.

B. Incarceration Creates A Counterproductive Cycle Of Nonpayment And Contempt And Precludes Implementation Of More Efficient, Constructive Alternatives.

In addition to imposing substantial unnecessary costs on the State and local governments, incarceration impedes an obligor's ability to provide for his or her child, in many cases creating a cycle of contempt and incarceration. Few parent-debtors are able to generate income while incarcerated. Indeed, nationwide, prisoners who owed $10,000 in child support obligations before imprisonment frequently owed $20,000 or more once released. *See* Center for Law and Social Policy, *Staying in Jobs and Out of the*

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13 2% proportion of family court detainees from all thirty-three participating counties.

Underground: Child Support Policies That Encourage Legitimate Work 1 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0349.pdf; *see also* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 No. 1 Judges' J. 5, 7 (2004).

In addition to facing mounting arrearages upon release, many indigent obligors, like petitioner, face barriers to employment, which can be "made more difficult by virtue of th[eir] prison record." Rebecca May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, *available at* http://www.cffpp.org/publications/effect_child.html. And in South Carolina, the clock is ticking: within a month, the clerk will again review the child support accounts and determine whether scheduled payments are late by five days or more. S.C. R. Fam. Ct. 24(a). Thus, parent-debtors soon find themselves subject to a costly cycle of incarceration:

> [F]athers exit the detention cent[er] owing more than they did when they left [home], with no more employment skills than when they entered. Many fathers lose their housing, transportation and other assets they were able to acquire . . . . [W]ithin a short period of time they find themselves again ruled into court for non-payment of child support and incarcerated.

Irene Luckey & Lisa Potts, *Alternative to Incarceration for Low-Income Non-Custodial Parents*, 16 Child & Fam. Social Work 22, 23 (2011). Indeed, that is exactly what happened to petitioner Turner. Turner was jailed on at least five occasions for contempt. Pet. Br. 9-15. During at least three prison terms, Turner's unpaid child support debt continued to grow. *Id.* And each time Turner was released from

jail, the clerk soon issued another rule to show cause and the cycle began again *Id.*

Work release programs, often promoted as employment options for incarcerated child support obligors, have proven ineffectual at stemming this cycle. Work release programs are designed to allow eligible prisoners to work at offsite businesses at designated times. Luckey & Potts, *supra*, at 23. But inmates must meet certain criteria, *see* Pet. Br. 12 n.8, and the program depends upon voluntary participation by employers who are seldom willing to accommodate the program's transportation and scheduling restraints, especially for low-skill, low-wage prisoners. Luckey & Potts, *supra*, at 23.

These impediments are aggravated in the current economic recession. One study shows that, even for a once-productive work release program in York County, South Carolina, only eight of the forty prisoners were participating in the program in 2009, five of whom were continuing employment obtained before they were incarcerated. South Carolina Center for Fathers and Families, *Impact on Detention Center Population of "Jobs Not Jail" Alternative Sentencing Program* 3, *available at* http://www.scfathersandfamilies.com/public/files/docs/Impact%20of%20Jobs%20Not%20Jail.pdf. Even in a more robust economy, the State continues to bear the costs of confinement during a work release program. Luckey & Potts, *supra*, at 23.

Alternatives to imprisonment, which, as noted, may require the assistance of counsel to pursue, have been developed in some South Carolina counties. Employment-based fatherhood programs, such as the Alternative to Incarceration ("ATI") program, have proven effective at securing long-term employment

for poor noncustodial fathers. From 2006 to 2009, ATI helped 1,171 putative contemnors keep or obtain employment, earn approximately $6.9 million in wages, and pay roughly $1.5 million in child support. *Id.* at 28-29. Even during the 2008-2009 recession year, where unemployment in the nine participating counties ranged from 8% to 17%, the program helped 390 putative contemnors earn nearly $1.8 million in wages and pay more than $460,000 in child support. *Id.*

Such programs not only increase child support satisfaction, but are also cost effective for the State. ATI program costs, for example, were at least $2 million less per year than the average incarceration costs for all program participants. *Id.*

These savings and benefits are lost to the State and the family each time an indigent putative contemnor is sentenced to prison. The intervention of counsel can help break the cycle of incarceration and forge constructive, sustainable, and efficient alternatives.

C. Incarceration Negatively Affects Noncustodial Family Relationships.

Even among separated families, incarceration deprives children of the prospect of cultivating a relationship with their noncustodial parent. *See* Patterson, *supra*, at 126. Studies have shown a correlation between paternal involvement and offspring behavioral development. *See, e.g.*, Jeffrey Rosenberg & W. Bradford Wilcox, U.S. Dep't of Health and Human Servs., *The Importance of Fathers in the Healthy Development of Children* 11-13 (2006), *available at*: http://www.childwelfare.gov/pubs/usermanuals/fatherhood/fatherhood.pdf; *see generally* Paul R. Amato & Fernando Rivera, *Paternal Involvement and*

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Children's Behavior Problems, 61 J. of Marriage & Family 375 (1999). Once behind bars, however, noncustodial fathers largely are precluded from providing any developmental support.

In the case of indigent noncustodial parents like petitioner, recurring civil contempt proceedings may further strain relationships and destabilize the child's developmental environment:

> Being forced into repeated court appearances with mother as plaintiff (although the state initiated the case) and father as defendant undermines relationships in these fragile families . . . . The mother's name on the case may make it look like she instigated the case, though she actually has no control in the decision to begin a contempt action and is often not informed about the action until she, too, receives a summons.

Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 Notre Dame L. Rev. 325, 373 (2005).

Incarceration is not only financially costly and counterproductive, but it may exacerbate the breakdown of the family unit. By contrast, the guarantee of counsel is a fiscally prudent measure and serves to fashion productive solutions to child support delinquencies.

CONCLUSION

The decision of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

17

No. 10-10

In the Supreme Court of the United States

MICHAEL D. TURNER, PETITIONER

v.

REBECCA L. ROGERS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF TEXAS, ALABAMA, ARIZONA, COLORADO, FLORIDA, HAWAII, MAINE, MISSISSIPPI, NEW HAMPSHIRE, SOUTH CAROLINA, UTAH, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 1

Argument 2

I. The Writ Should Be Dismissed Because Turner's Case is Moot 2

A. Turner Cannot Satisfy the "Capable of Repetition" Doctrine by Proclaiming His Intent to Willfully Defy a Child-Support Order or Assuming that State Courts Will Erroneously Hold Him in Civil Contempt if He is Unable to Pay 4

B. Turner Cannot Satisfy the "Capable of Repetition" Exception to Mootness Unless He Establishes that he Will be Unable to Retain Pro Bono Counsel in Future Civil-Contempt Proceedings 9

II. The Constitutional Right to Appointed Counsel Extends Only to "Criminal Prosecutions," Not Civil Proceedings 11

III. The Relaxed Procedures of the South Carolina Family Courts Present No Need for Appointed Counsel in the Broadest Category of Cases 17

Conclusion 20

TABLE OF AUTHORITIES

Cases:

Alabama v. *Shelton*,
535 U.S. 654 (2002) 7, 8

Albright v. *Oliver*,
510 U.S. 266 (1994) 14

Alden v. *Maine*,
527 U.S. 706 (1999) 16, 17

Argersinger v. *Hamlin*,
407 U.S. 25 (1972) 8

ASARCO Inc. v. *Kadish*,
490 U.S. 605 (1989) 11

Betts v. *Brady*,
316 U.S. 455 (1942) 12, 13

Cardinal Chem. Co. v. *Morton Int'l, Inc.*,
508 U.S. 83 (1993) 10, 11

City of Los Angeles v. *Lyons*,
461 U.S. 95 (1983) 4-6, 11

DaimlerChrysler Corp. v. *Cuno*,
547 U.S. 332 (2006) 11

FEC v. *Wis. Right to Life, Inc.*,
551 U.S. 449 (2007) 3, 6

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18 U.S.C. 3006A 9

S.C. Code Ann. § 63-3-620 5

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S.C. Fam. Ct. R. 25 19

S.C. R. Civ. P. 5(a) 19

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INTEREST OF AMICI CURIAE

Petitioner Michael Turner invites this Court to create a constitutional right to appointed counsel in civil-contempt proceedings. Although many of the amici States already provide appointed counsel to civil contemnors, the amici States have a substantial interest in defending their constitutionally protected prerogatives under the Tenth Amendment. These include the right to control their own fisces by deciding whether and when to allocate funds for appointed counsel in cases outside the "criminal prosecutions" enumerated in the Sixth Amendment.

SUMMARY OF ARGUMENT

1. Turner's case is moot because his sentence for civil contempt expired before he filed his petition for a writ of certiorari, and he does not suffer any collateral consequences from that sentence. His "capable of repetition but evading review" argument fails because, under South Carolina law, inability to pay child support is a complete defense in civil-contempt proceedings. Turner's "capable of repetition" argument therefore assumes either that he intends to defy his child-support obligations in the future, or else that state-court judges will mistakenly imprison him for civil contempt when he is unable to pay. Neither of these assumptions can be reconciled with this Court's precedent: parties may not keep a moot dispute alive by promising to violate their legal obligations, or by indulging assumptions that state officials will violate or misapply state law. It is not enough for Turner to allege that he is likely to be jailed again; he must demonstrate a "reasonable expectation" that he will suffer incarceration while

making every effort to satisfy his child-support responsibilities.

2. Turner cannot escape the text of the Sixth Amendment, which guarantees the right to counsel only in "criminal prosecutions." And the Fourteenth Amendment's Due Process clause cannot reasonably be construed to require a categorical right to appointed counsel in any class of civil proceedings, when the Sixth Amendment explicitly addresses the right to counsel and extends it only to "criminal prosecutions." Nor can Turner avoid the Tenth Amendment, which reserves to the States the authority to decide when to provide appointed counsel, often at taxpayer expense, in proceedings that fall outside the "criminal prosecutions" described in the Sixth Amendment. Although many of the amici States already provide appointed counsel to civil contemnors as a matter of legislative grace, they should not be punished for this beneficence with a court ruling that transfers ever more of their decision-making powers to the federal judiciary.

3. South Carolina has chosen to establish a relaxed system of procedural rules in its family courts that are easily navigable by pro se litigants. The Constitution allows States to structure their family courts in this manner without requiring them to formalize proceedings with the provision of appointed counsel.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED BECAUSE TURNER'S CASE IS MOOT

Turner's certiorari petition challenges procedures used years ago in a state-court proceeding that no

longer has any live or lasting effect. Turner long ago completed his twelve-month sentence for civil contempt and suffers no collateral consequences from this jail stint. And he does not seek retrospective relief in the form of money damages. His petition therefore fails to present a case or controversy under Article III. See *Spencer* v. *Kemna*, 523 U.S. 1 (1998); *St. Pierre* v. *United States*, 319 U.S. 41 (1943).

Both Turner and the United States try to shoehorn this case into the "capable of repetition yet evading review" exception to mootness, but their efforts are glib. The capable-of-repetition doctrine requires a litigant to demonstrate, at the very least, that: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). But South Carolina law prohibits courts from holding parents in civil contempt when they are *unable* to meet their child-support obligations. Only those who "wilfully violate" a child-support order are subject to a civil-contempt citation. That means Turner cannot establish any "expectation" of repeated imprisonment unless he announces plans to flout his child-support obligations, or asks this Court to assume that the South Carolina courts will violate or misapply their own law. The former approach is foreclosed by this Court's precedent; the latter approach denigrates state officials and fails to establish a "reasonable" expectation of future injury. This Court should dismiss the writ of certiorari for lack of jurisdiction.

A. Turner Cannot Satisfy the "Capable of Repetition" Doctrine by Proclaiming His Intent to Willfully Defy a Child-Support Order or Assuming that State Courts Will Erroneously Hold Him in Civil Contempt if He is Unable to Pay

Many times this Court has held that litigants cannot establish an Article III case or controversy by announcing plans to spurn their legal obligations. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 320 (1988) ("[W]e generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."); *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974) (refusing to confer standing to seek injunctive relief when "the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law"). This is true even if a litigant could demonstrate a "reasonable expectation" of suffering a constitutional injury on account of his future misconduct. In *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), for example, this Court held that a chokehold victim could not seek injunctive relief under Article III because he would suffer future harm only if he "illegally resist[s] arrest or detention" or the officers "disobey their instructions" and choke him without provocation. *Id.* at 106. This Court refused to indulge either assumption in concluding that Lyons's claim for injunctive relief failed to present a live case or controversy under Article III.

Turner's situation is no different from *Lyons*. Under South Carolina law, Turner cannot be jailed for civil contempt unless he "wilfully violates" a court's child-support order; inability to pay is a

complete defense. See S.C. Code Ann. § 63-3-620; *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983) ("Contempt occurs when a parent ordered to pay child support voluntarily fails to pay. When the parent is *unable* to make the required payments, he is not in contempt. The record in this case reveals that respondent faithfully paid each week as much child support as he could afford."). *Moseley* exposes the sophistry of Turner's efforts to invoke the "debtors' prison" trope. Pet. Br. 17 (arguing that South Carolina has "no interest at all in maintaining a de facto debtors' prison for child-support obligors who genuinely cannot pay"). Turner was jailed not because he was unable to afford his payments, but because he persistently failed to make *any* child-support payments, opting to spend his money on marijuana and methamphetamine rather than attempting to satisfy his legal obligations. J.A. 17a.

So the alleged constitutional injury for which Turner seeks redress—incarceration without the benefit of counsel—cannot repeat itself unless this Court assumes either that: (1) Turner will violate state law by willfully spurning his child-support obligations; or (2) South Carolina's judges will misapply state law and hold Turner in civil contempt even though he lacks the means to pay. As in *Lyons*, neither of these assumptions can undergird a finding of "capable of repetition yet evading review" by this Court. The first assumption leaves those who plan willfully to violate their legal obligations better off than those who intend to obey them. The second supposes that state officials will violate or misapply state law, or otherwise exceed the scope of their authorized powers, whenever Turner faces his next round of civil-contempt proceedings. *Lyons* refused

to assume that the Los Angeles police officers would misapply their internal guidelines governing the use of chokeholds. South Carolina's judges are entitled to at least as much respect from this Court.

Of course, Turner wants this Court to believe that South Carolina's failure to provide appointed counsel will cause the state's family courts to mistakenly reject Turner's inability-to-comply defense and incarcerate him when he is truly unable to pay. See Pet. Br. 35, 45-46. Yet the record in this case indicates that the family court properly found Turner in "wilful[] violat[ion]" of his child-support obligations. Turner admitted in open court that he consumed illegal drugs while he failed to pay any child support. Illegal drugs cost money, and this fact alone supports the family court's refusal to accept Turner's inability-to-comply defense. Amici therefore do not see how Turner can establish a "reasonable expectation" that he will again suffer incarceration, absent an assumption that Turner will repeat the same misconduct that landed him in the clink the first time. And the "capable of repetition" doctrine does not allow Turner to escape mootness by showing that someone else might be wrongfully incarcerated by the South Carolina family courts. See *Wis. Right to Life*, 551 U.S. at 462 (requiring litigants to demonstrate "a reasonable expectation that the *same complaining party* will be subject to the same action again"); *Lyons*, 461 U.S. at 105.

Turner tries to distinguish *Lyons*, *Honig*, and *O'Shea* by re-characterizing the nature of his purported constitutional injury. He carefully avoids arguing that his actual-imprisonment-without-counsel is "capable of repetition" or likely to occur again. Instead, he claims only that he is likely to

face a new round of civil-contempt proceedings, in which he might "*face the prospect of incarceration* without having counsel appointed to assist in his defense." Pet. Br. 26 (emphasis added). The problem for Turner, however, is that merely standing trial without the benefit of appointed counsel cannot qualify as a redressable constitutional injury. This Court has held repeatedly that States do not violate the Constitution if they withhold appointed counsel from defendants in trials that produce only a fine or an acquittal. This remains true even when an unrepresented defendant stands trial for an offense that *could* be punished by incarceration—so long as the actual sentence imposed eschews any term of imprisonment.[1] *See, e.g.*, *Scott* v. *Illinois*, 440 U.S. 367, 373-374 (1979) ("We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."); *see also* *Alabama* v. *Shelton*, 535 U.S. 654 (2002) (holding that States may not impose suspended or probationary sentences that might result in imprisonment in cases where the State withholds appointed counsel). Turner does not ask

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[1] This holding logically follows from the text of the Fourteenth Amendment's Due Process Clause. *See* U.S. Const. amend. XIV § 1 ("nor shall any State deprive any person of life, liberty, or property without due process of law"). If a defendant serves no jail time because he is acquitted, he has not been deprived of his liberty, and absent a deprivation of "liberty," there can be no constitutional violation in a State's failure to provide appointed counsel in a court proceeding.

this Court to overrule *Scott*, so he cannot characterize his next round of civil-contempt proceedings, in which he might "face the prospect of incarceration" (Pet. Br. 26) without appointed counsel, as a repeating constitutional injury under the capable-of-repetition doctrine. The defendant in *Scott* likewise "face[d] the prospect of incarceration without having counsel appointed to assist in his defense" (*ibid.*),[2] but it is settled that this alone does not violate the Constitution until the trial produces a sentence that provides for imprisonment.[3]

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[2] The defendant in *Scott* was charged with a crime punishable by a year in jail, a fine of up to $500, or both. The judge sentenced him only to a $50 fine. *See Scott*, 440 U.S. at 368.

[3] When Turner suggests that the right to appointed counsel can extend to "*any proceeding that* 'may end up in the actual deprivation of a person's liberty'" (Pet. Br. 28) (emphasis added), he overstates this Court's holding in *Alabama* v. *Shelton* and quotes the opinion out of context. Here is what the Court actually said in *Shelton*: "We hold that *a suspended sentence* that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." 535 U.S. at 658 (emphasis added). *Shelton* does not hold that States must provide court-appointed counsel whenever a *proceeding* might result in imprisonment. Rather, *Shelton* holds only that courts could not impose suspended or probationary *sentences* that might lead to imprisonment in trials where the State withheld appointed counsel. *See also id.* at 661 n.3 ("Shelton also urges this Court to overrule *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, 440 U.S. 367 (1979), to the extent those cases do not guarantee a right to counsel 'in all cases where imprisonment is an authorized penalty.' *We do not entertain this contention* * * *.") (emphasis added) (internal citation omitted).

The alleged constitutional injury in this case is Turner's *sentence of imprisonment* without the benefit of counsel. That injury cannot recur unless this Court assumes that Turner will flout the child-support order *or* the state courts will wrongfully imprison Turner for contempt despite his inability to satisfy his child-support obligations. Neither of these assumptions is respectful of the States or consistent with *Lyons*.

B. Turner Cannot Satisfy the "Capable of Repetition" Exception to Mootness Unless He Establishes that He Will be Unable to Retain Pro Bono Counsel in Future Civil-Contempt Proceedings

Although Turner did not have a lawyer in his 2008 civil-contempt proceeding, he has managed to secure pro bono counsel both for his direct appeals and his separate 2010 civil-contempt hearing. Yet Turner maintains that this has no bearing on whether his alleged constitutional harms are "capable of repetition." He characterizes his constitutional injury as "the failure of the family court to *appoint* counsel" (Pet. Br. 27), which he claims is likely to recur regardless whether Turner will be able to obtain pro bono representation in his future civil-contempt proceedings.

Once again, Turner errs by proceeding as if the mere failure to appoint counsel can qualify as a constitutional injury. A failure to appoint counsel does not violate the Constitution when a defendant is able to retain his own lawyer (either pro bono or with his own money). See 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 732 (3d ed. 2010) (citing *United States* v. *White*, 344 F.2d 92, 93 (4th Cir. 1965)); 18 U.S.C. 3006A (providing for appointed counsel only for criminal

defendants "financially unable to obtain adequate representation"). Turner does not challenge this longstanding proposition, so he cannot assert a recurring constitutional injury without providing *some* reason for this Court to believe that he will be unable to secure pro bono counsel in future civil-contempt proceedings.

The United States takes a different approach to this problem. It acknowledges that Turner's ability to secure pro bono representation might defeat his capable-of-repetition argument, but thinks this can happen only if Turner's pro bono counsel were "bound to represent [Turner] in every future contempt proceeding." See U.S. Br. 15-16 n.5. This approach is too narrow. Turner's lawyers cannot be allowed to evade the jurisdictional limits on this Court's power if they intend to represent Turner in future civil-contempt proceedings, regardless whether they memorialize those intentions in a binding agreement. At the very least, this Court should extract a statement from Turner's current lawyers that they have no plans to represent him in future contempt proceedings before considering Turner's efforts to invoke the capable-of-repetition doctrine.

The United States also suggests that respondents bear the burden of proving mootness in this case. See U.S. Br. 16 n.5 ("There is no indication in the record, however, that pro bono counsel is under any such obligation * * * ."). But Turner invoked the federal courts' jurisdiction when he asked this Court to review the state court's judgment. He must therefore bear the burden of establishing that an Article III case or controversy existed at the time he filed his petition in this Court. See *Cardinal Chem.*

Co. v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) ("the initial burden of establishing [Article III] jurisdiction rests on the party invoking that jurisdiction"); see also *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 n.3 (2006) ("because '[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record,' the party asserting federal jurisdiction when it is challenged has the burden of establishing it"); *Lyons*, 461 U.S. at 109 ("[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where *the named plaintiff can make a reasonable showing that* he will again be subject to the alleged illegality.") (emphasis added); see also *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989). The burden of proof falls on the party asserting mootness only when the federal courts' Article III jurisdiction had been established earlier in the proceedings; this often occurs when the litigation was commenced in federal district court rather than state court. See, *e.g.*, *Cardinal Chem. Co.*, 508 U.S. at 98 ("[O]nce that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result."). But in this case, Turner's sentence expired long before he turned to federal court.

II. THE CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL EXTENDS ONLY TO "CRIMINAL PROSECUTIONS," NOT CIVIL PROCEEDINGS

Many States, including Texas, appoint counsel for indigent defendants in civil-contempt proceedings.

They have done so either as a matter of legislative grace or as a matter of state constitutional law. See, *e.g.*, Pet. 16-18 (citing examples). But this Court should not treat these voluntary actions by the States as evidence of a federal constitutional entitlement to appointed counsel in civil proceedings.

On occasion, this Court has invoked the views of the States to justify rulings that expand the constitutional right to appointed counsel. In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), for example, this Court relied on the fact that twenty-two States filed an amicus brief supporting Mr. Gideon's request to overrule *Betts* v. *Brady*, 316 U.S. 455 (1942), and noted that only three States supported Florida's position that *Betts* should be retained.[4] But the amici States oppose any attempt to use our voluntary decisions to provide counsel to the indigent in civil-contempt proceedings as a reason for this Court to entrench a fledgling civil *Gideon* regime as a matter of federal constitutional law.

To begin, the Tenth Amendment prohibits this Court from imposing constitutional mandates on the States that have not attained the supermajoritarian pedigrees required by Articles V and VII.[5] *Gideon*'s

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[4] See *Gideon*, 372 U.S. at 345 ("Florida, supported by two other States, has asked that *Betts* v. *Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree.").

[5] See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

decision to extend the right to appointed counsel to all felony cases may be hard to reconcile with the original understanding of the Sixth Amendment,[6] but at least *Gideon* can be squared with the text of that provision, which states that in "criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.[7] The right to appointed counsel that Turner seeks, by contrast, makes no pretense of respecting the Sixth Amendment's explicit textual limitation to "criminal prosecutions"; it spurns *both* the language and original meaning of the Assistance of Counsel Clause. And it is not plausible to interpret the Fourteenth Amendment's Due Process Clause as guaranteeing a right to appointed counsel that extends beyond the explicit right to counsel enshrined in the Sixth Amendment. See *Graham* v. *Connor*, 490 U.S. 386 (1989) (forbidding litigants from using the Due Process Clause to challenge excessive force used during a

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[6] The First Congress—the same Congress that approved the Sixth Amendment—enacted legislation providing for appointed counsel only in capital cases. See Federal Crimes Act of 1790, ch. 9, 1 Stat. 112, 118.

[7] See also Akhil Reed Amar, *The Constitution and Criminal Procedure* 140 (1997) (noting that "[t]he text of the counsel clause can be read either way" on whether it protects the right only to retained counsel or also to appointed counsel); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717, 1745 (2003) (noting that *Gideon*'s holding "fits comfortably with the language" of the Sixth Amendment, while acknowledging that "the original understanding of this provision was that the government may not forbid a criminal defendant from hiring a lawyer with his own money").

seizure "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct").[8]

Turner notes that South Carolina's civil-contempt proceedings may occasionally result in a judge mistakenly incarcerating one who is unable to comply with the court order, and suggests that such outcomes retroactively convert an otherwise civil proceeding into a punitive "criminal prosecution." Pet. Br. 42. But this inherent risk of error in civil-contempt proceedings—which exists regardless whether a State provides for appointed counsel—cannot possibly require the States to treat *every* civil-contempt proceeding that results in imprisonment as a *de facto* "criminal prosecution" for Sixth Amendment purposes. If it did, this would trigger the full panoply of Sixth Amendment procedural protections—not only the right to counsel but also the right of jury trial and the evidentiary rules required by the Confrontation Clause. Nor can Turner plausibly maintain that the character of a civil-contempt proceeding depends on the correctness

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[8] See also *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994) (four-Justice plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.") (citations and internal quotation marks omitted); *id.* at 281 (Kennedy, J., concurring in the judgment) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process").

of its outcome. *Any* type of trial will on occasion produce erroneous results, and the Constitution does not guarantee the right to an error-free trial, even in real criminal prosecutions. See, *e.g.*, *Herrera* v. *Collins*, 506 U.S. 390 (1993).

The amici States also oppose Turner's efforts to constitutionalize a right to appointed counsel in civil-contempt proceedings because it will open the door for litigants and courts to extend *Gideon* to habeas corpus proceedings and other civil proceedings that raise the specter of confinement. Although Turner purports to seek only a holding that requires appointed counsel in civil-contempt proceedings, he rests his argument on the principle that indigent litigants are entitled to appointed counsel whenever they are "facing incarceration." Pet. Br. 27. Having jettisoned the Sixth Amendment's explicit textual distinction between "criminal prosecutions" and civil proceedings, Turner proposes a test that will empower a broad swath of civil litigants to raise plausible constitutional claims for appointed counsel. This is especially true of habeas corpus petitioners challenging the legality of their confinement: like Turner, they will face continued incarceration (or even the death penalty) if their inability to obtain appointed counsel causes a post-conviction court to reject their claims. And although Turner's ambitions in this case appear modest, one need only glance at the amicus brief filed by the American Bar Association to see that the aspirations for a civil-

Gideon regime extend far beyond the civil-contempt proceedings at issue in this case.[9]

The danger in a case such as this is that the seemingly narrow holding that Turner seeks, combined with the willingness of many (though not all) States to provide appointed counsel to indigent civil contemnors, may cause this Court to discount the ways in which Turner's proposal will infringe the States' constitutionally protected prerogatives. The notion that States should provide appointed counsel for indigent litigants in civil-contempt proceedings may be an enlightened policy choice—indeed, it is a policy that many of the amici States have adopted without any prodding from this Court. But to freeze this benign policy into a requirement of federal constitutional law will shift control of a State's fisc away from its elected officials and toward federal judges, who will impose on the States their own ideas of when they should provide appointed counsel in civil proceedings. As this Court noted in *Alden* v. *Maine*, 527 U.S. 706 (1999), many "important needs

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[9] See ABA Amicus Br. 3 n.8 ("Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, *postconviction relief*, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.") (emphasis added); *id.* at 4 ("The ABA's work in the area of legal services to low-income persons also has led it to conclude that counsel should be provided as a matter of right to low-income persons *in adversarial proceedings where basic human needs are at stake*, such as those involving sustenance, safety, health, or child custody determinations.") (emphasis added).

and worthwhile ends compete for access to the public fisc," and

> [s]ince all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government.

527 U.S. at 751. The decision whether to expend a State's limited public funds on providing appointed counsel in civil proceedings—much like the decision to waive sovereign immunity—belongs to that State's officials and the people to whom they are accountable, not the federal judiciary.

III. THE RELAXED PROCEDURES OF THE SOUTH CAROLINA FAMILY COURTS PRESENT NO NEED FOR APPOINTED COUNSEL IN THE BROADEST CATEGORY OF CASES

Although South Carolina declines to provide appointed counsel in its child-support civil-contempt proceedings, it compensates by establishing procedural rules for its family courts that are more relaxed and informal, and less adversarial, than the rules that apply in ordinary civil proceedings. There are no jury trials, formal discovery, or summary judgments in South Carolina's family courts. What's more, South Carolina Family Court Rules 7(c) and 7(e) loosen the rules of evidence by allowing obligors to introduce unauthenticated documents, including W-2 forms, paycheck stubs, doctors' and employers'

notes, and income-tax returns. These procedures are designed to be easily navigable by pro se litigants.

There are several notable aspects of the rules of procedure in South Carolina's family courts.[10] First, the rules not only permit, but require, courts to admit certain unauthenticated documents and statements into evidence. South Carolina Family Court Rule 7(c) requires courts to admit unauthenticated doctors' notes.[11] And Rule 7(e) requires courts to admit unauthenticated wage statements and other financial documents.[12] Second, the family-court rules explicitly break from the South Carolina Rules of Civil Procedure in the following respects:

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[10] The South Carolina rules of court are available online at http://www.judicial.state.sc.us/courtReg/.

[11] See S.C. Fam. Ct. R. 7 ("The following documents and written statements shall be admissible without requiring that the persons or institution issuing the documents or statements be present in court: * * * (c) The written statement by a physician showing that a patient was treated at certain times and the type of ailment.").

[12] See S.C. Fam. Ct. R. 7 ("The following documents and written statements shall be admissible without requiring that the persons or institution issuing the documents or statements be present in court: * * * (e) A written statement of an employer showing wages either weekly or monthly for a given period of time and W-2 statement, income tax returns and other reports of like nature.").

Apart from these exceptions, the state courts have recognized that S.C. Fam. Ct. R. 7 was not intended to "supplant the substantive rules of evidence." See *S.C. Dep't of Soc. Servs.* v. *Flemming*, 244 S.E.2d 517 (S.C. 1978).

• They require that defendants receive notice of every hearing. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 5(a).

• They provide that the failure to file a responsive pleading cannot be deemed an admission. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 8(d).

• They preclude courts from converting motions to dismiss into summary-judgment motions. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 12(b).

• They prohibit jury trials. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 38, 39, 40, 42, 51.

• They permit leading questions on direct examination as well as cross-examination. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 43(b)(1).

• They prohibit special verdicts, interrogatories, directed verdicts, defaults, and summary judgments. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 49, 50, 55, 56.

Third, the South Carolina family-court rules encourage informal discovery and permit formal discovery only upon court order or the parties' stipulation.[13]

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[13] See S.C. Fam. Ct. R. 25 ("Recognizing the unique nature of the court's jurisdiction and the need for a speedy determination thereof, the prompt voluntary exchange of information and documents by parties prior to trial is encouraged. However, formal depositions or discovery shall be conducted only by stipulation of the parties or by court order upon application therefor in writing. Such an order may prescribe the manner, time, conditions, and restrictions pertaining to the deposition or discovery.").

S.C. Fam. Ct. R. 2(a) does provide, however, that that "[i]n addition to the rules set forth in Sections I, II and III of these

Finally, as explained in respondents' brief, empirical evidence confirms that the child-support civil-contempt proceedings in South Carolina family court differ from the formal, adversarial criminal trials that require appointed counsel. Litigants do not question or cross-examine witnesses; judges handle all the questioning. And although many litigants are cited for contempt, only a few are actually confined. Judges carefully tailor the purge amounts and timing to an obligor's ability to pay, which helps contemnors avoid confinement. In the rare cases where lawyers appeared, they performed only tasks that pro se litigants would be equally capable of doing. There is no need for a right to appointed counsel in such simple proceedings.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction. In the alternative, the judgment of the Supreme Court of South Carolina should be affirmed.

Rules of Family Court, the South Carolina Rules of Civil Procedure (SCRCP) shall be applicable in domestic relations actions to the extent permitted by Rule 81, SCRCP."

Respectfully submitted.

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